

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2023

United States Court of Appeals
For The Second Circuit

Docket No. 77-2023

UNITED STATES OF AMERICA, ex rel.
VICTOR MAYO,

Petitioner-Appellant

-against-

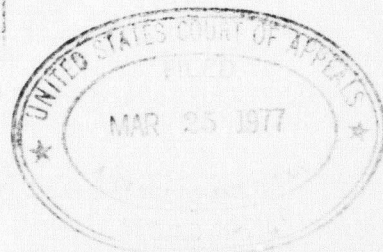
RAY BOMBARD, Superintendent of Greenhaven
Correctional Facility at Stormville, New York,

Respondent-Appellee

On Appeal From The United States District Court
For The Southern District of New York

PETITIONER-APPELLANT'S APPENDIX

JAMES B. KOBAK, JR.
Attorney for Petitioner-Appellant
One Wall Street
New York, New York 10005
(212) 943-6500



PAGINATION AS IN ORIGINAL COPY

APPENDIX

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PLAINTIFFS

MAYO, VICTOR

DEFENDANTS

CANNELLA, J.

ROY BOMBARD, SUPERINTENDENT
GREENHAVEN CORRECTIONAL FACILITY
AT STORMVILLE, NEW YORK

Habeas Corpus

CAUSE

mm

ATTORNEYS

James B. Kobak, Jr.
One Wall Street
New York, N.Y. 10005
943-6500

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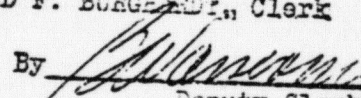
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DATE	NR.	PROCEEDINGS
03-30-76	1	Filed Petition for a Writ of Habeas Corpus.
03-30-76	2	Filed Order permitting Petitioner to proceed in forma pauperis w/o prepayment of fees or costs. EDELSTEIN, J.
04-08-76	(3)	Filed Order appointing persons to serve Show Cause Order. CANNELLA, J.
04-08-76	(4)	Filed petitioner's Order to Show Cause for writ of habeas corpus. Rec. 04-28-76. CANNELLA, J.
04-08-76	(5)	Filed memorandum of law in support of petition for writ of habeas corpus.
04-09-76	(6)	Filed affdvt. of service by an individual of OTC, petition for W/H/C, Memorandum of Law in support of petition and exhibits in support of petition- on Asst' Attorney General of State of N.Y. at Atty. General's office on 4-8-76
05-07-76	(7)	Filed respondent's memorandum of law in opposition to petition for writ of habeas corpus.
05-07-76	(8)	Filed respondent's affdvt. of Joseph W. Henneberry in opposition to petitioner's application for a writ of habeas corpus.
05-18-76	(9)	Filed petitioner's reply affdvt. to respondent's opposition to petition for writ of habeas corpus.
05-18-76	(10)	Filed petitioner's reply memorandum.
01-05-77	(11)	Filed Memorandum-- for the reasons stated, the petition for a writ of habeas corpus is hereby denied. So ordered- CANNELLA, J. (m/n)
01-26-77	(12)	Filed Petitioner's NOTICE OF APPEAL to USCA 2nd Circuit from order and judgment filed 1-5-77. m-n Louis J. Lefkowitz, Atty. General, 2 World Trade Center, NYC 10047.
01-27-77	(13)	Filed Petitioner's Application for certificate of probable cause.
02-24-77	(14)	Filed petitioner's application for certificate of probable cause, to appeal.
02-24-77	5	Filed memo endorsed on document # 14-- for the reason stated, application is granted. So ordered- CANNELLA, J. (m/n)
03-06-77	--	Filed notice that the writ of habeas corpus has been granted and is limited to the writ for this day.

A TRUE COPY
RAYMOND F. BURGENDE, Clerk

By 
Deputy Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
VICTOR MAYO, :
 :
 : Petitioner, : PETITION FOR
 : -against- : A WRIT OF
 : : HABEAS CORPUS
ROY BOMBARD, Superintendent, : 76 Civ.
Greenhaven Correctional Facility :
at Stormville, New York, :
 : Respondent. :
----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JAMES B. KOBAK, JR., being duly sworn, deposes
and says:

1. I am a member of the Bar of this Court and with Richard P. Caro was appointed by the United States Court of Appeals for the Second Circuit in 1973 to represent the Petitioner, Victor Mayo, in appealing a denial of his prior petition for a Writ of Habeas Corpus by the Hon. Morris E. Lasker of the United States District Court for the Southern District of New York in 1972. On behalf of the Petitioner, I make the following statements in support of a petition for a Writ of Habeas Corpus based upon my personal knowledge and upon the records of the prior judicial proceedings.

2. Victor Mayo is presently confined in the Greenhaven Correctional Facility, at Stormville, New York, of which Respondent, Roy Bombard, is the Superintendent. Petitioner is serving a 15 to 25 year term of imprisonment pursuant to a sentence imposed on May 25, 1966, by the Supreme Court, New York County, upon a conviction based on a plea of guilty to first degree manslaughter (Indictment No. 3301/65). The 1966 sentence was based

on former New York Penal Law § 1941, a "recidivist statute." The predicate for this sentence was a 1960 conviction for robbery in the third degree, petit larceny and assault in the second degree arising from the robbery of approximately fifteen to seventeen dollars and two packs of cigaretees from a candy store. (Indictment No. 1178/60.) As explained in Paragraph 12, infra, if this Writ were granted, Petitioner would be subject to being re-sentenced for a shorter term and would become eligible for parole immediately.

3. Petitioner now seeks a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1970) on the ground that his 1960 conviction and subsequent imprisonment was in violation of his constitutional rights as guaranteed by the Sixth and Fourteenth Amendments to the Constitution in that:

a. He was denied effective assistance of counsel during the 1960 proceedings because

- (i) although Petitioner's court-appointed attorney knew that Petitioner had been declared legally insane, had spent five years in state psychiatric institutions and was even then receiving treatment in the Brooklyn Aftercare Clinic, the attorney neither raised the defense of insanity nor sought a determination of either Petitioner's sanity or competency (see ¶ 6, infra); and
- (ii) Petitioner's court-appointed attorney otherwise failed to render the minimum amount of legal assistance constitutionally requisite for adequate representation (see ¶ 7, infra).

b. Petitioner was denied Due Process of Law in that at the time of his trial and sentencing both the State and

the court knew of his long history of serious mental illness, retardation, and possible brain damage and epilepsy. Despite the bona fide doubts of competency raised by these facts no hearing was held in 1960 nor has any hearing been held subsequently in which the State established that Petitioner was competent to be tried in 1960 as required by state law and by the Supreme Court's decisions in Pate v. Robinson, 383 U.S. 375 (1966), and Drope v. Missouri, 420 U.S. 162 (1975).

4. Petitioner has exhausted state remedies with respect to both of these contentions.

Competence --

In 1967, subsequent to Petitioner's second conviction, Petitioner filed an application for a Writ of Error Coram Nobis on the ground that he had been incompetent at the time of his 1960 trial. The Writ was denied after a brief hearing on December 4, 1967. The denial was affirmed on appeal by the Appellate Division. People v. Mayo, 32 App. Div. 2d 893, 302 N.Y.S.2d 999 (2d Dep't 1969). Leave to appeal to the New York Court of Appeals was denied on September 15, 1969.

Ineffective Assistance of Counsel --

In 1970, Petitioner was resentenced nunc pro tunc for the first conviction in 1960 upon a finding that he had not been advised of his right to appeal the 1960 conviction and had not otherwise known of his right to appeal at that time. Petitioner then appealed his 1960 conviction on the ground that he was denied effective assistance of counsel. The judgment of conviction was affirmed without opinion by the Appellate Division. People v. Mayo, 41 App. Div. 2d 903, 342 N.Y.S.2d 828 (2d Dep't 1973). Leave to appeal to the New York Court of Appeals was subsequently denied.

Ineffective Assistance of Counsel

5. Petitioner has never before raised the issue of ineffective assistance of counsel in any collateral proceeding in federal court.

6. The facts pertinent to this issue are as follows: Since Petitioner was indigent, the court appointed Michael Washor, a newly admitted attorney, to represent him. As a result of Mr. Washor's inexperience and Petitioner's incapacities caused by his mental illness and retardation, Petitioner's attorney was unable to render effective assistance of counsel with respect to any phase of Petitioner's defense.

Subsequent to Petitioner's arrest and before trial, Petitioner's mother told his attorney of his history of mental illness, and that he was currently under the care and supervision of the Brooklyn Aftercare Clinic. Petitioner's attorney, however, contacted neither the Brooklyn Aftercare Clinic nor the state hospitals in which Petitioner had been confined for five years, nor did he otherwise investigate Petitioner's state of sanity or competency. The attorney did not attempt to defend Petitioner on the grounds of insanity or seek to have Petitioner's then mental condition with respect to either his sanity or competency determined. (See Trial Transcript, Exhibit A - for convenience the exhibits are submitted herewith separately bound.) Despite the fact that Petitioner's attorney knew at the time of Petitioner's sentencing that Petitioner had been committed to a state hospital for five years, he represented to the court that no legal cause existed why sentence should not be imposed. (Sentencing Transcript, Exhibit B.)

Furthermore, in a habeas corpus hearing held in 1972 to determine Petitioner's competency in 1960 nunc pro tunc (see ¶ 8, infra) Petitioner's attorney testified that

he had not had "sufficient experience" to deal with the subject of mental illness even if he had known all of the facts of Petitioner's history of mental illness:

"Q. Mr. Washor, if you had known that Mr. Mayo had a practically uninterrupted history of institutionalization and a lengthy history of mental illness, that there were medical reports indicating he had suffered from epilepsy and congenital brain disease or brain damage, what would you have done?

* * *

"A. I do not believe that I would have handled it properly at the time. I had not the sufficient experience to handle it. I suggest that the proper thing for me to have done at the juncture would have been to have communicated that fact to the Court, having been assigned to represent the individual, and requesting that he be submitted initially for a psychiatric examination so that we could determine in the first instance whether or not he was competent to stand trial absent exploring the aspects of any defense that might be brought to light by the examination." 1972 Habeas Corpus Hearing Transcript at 26 (Exhibit C).

The attorney's failure to pursue the questions of Petitioner's sanity and competency cannot be explained or justified on grounds of legal tactics or strategy. Indeed, Petitioner does not recall the attorney ever raising these issues or asking Petitioner anything about his history of mental illness. Nor did Petitioner know or understand at the time of the 1960 trial that his retardation, mental illness, and brain damage were material to his defense or that any defense was possible.

7. There were other matters as well that were material to Petitioner's defense for which Petitioner did not receive effective assistance of counsel. First, incriminating admissions to the police were introduced into evidence without objection by Petitioner's attorney. No attempt was made by Petitioner's attorney to investigate these admissions or the circumstances

under which they were made. Nor was any attempt made to suppress these statements. Petitioner and a co-defendant were arrested shortly after the robbery at approximately nine o'clock in the evening at a bar next door to the candy store that they had allegedly robbed. They had been drinking most of the afternoon and evening. Petitioner's first admission to the police was allegedly made about a half-hour after interrogation at the station house, and his formal statement to an assistant district attorney was made at approximately 4 A.M. the following morning. Petitioner's illness, retardation, lack of education, youth, the duration of the custodial interrogation, and probable state of intoxication at the time indicate a substantial likelihood that his incriminating admissions were not voluntarily made. Petitioner has never had any memory of these statements and to this day does not recall what transpired while he was in custody the night of his arrest.

Second, the trial was not, in fact, a bona fide trial. Petitioner's attorney has testified that from the very beginning Petitioner wanted to "throw in the towel" by pleading guilty. (1972 Habeas Corpus Hearing Transcript at 29.) Petitioner's plea of guilty, however, was not made. Rather, with the knowledge of the trial court and pursuant to an agreement made by Petitioner's attorney with the prosecutor and the co-defendant's counsel, Petitioner was prevailed upon to plead not guilty, present no defense, confess on the stand that he committed the crime and assert that the co-defendant was not involved despite the co-defendant's confession to the contrary. Petitioner's willingness to go along with this plan was not a rational and free decision, but rather the result of his mental illness and retardation which caused him to do and say whatever he was told

by others. (See Psychiatric Report of Dr. E. G. Piana, Astor Home for Children, Exhibit D.)

Thus Petitioner's trial was not an adversary proceeding with respect to the question of his guilt. It was not conducted for Petitioner's benefit and protection. On the contrary, Petitioner's attorney knew that it was contrary to Petitioner's interests to attempt to exonerate the co-defendant since if the court disbelieved Petitioner's testimony, it was likely that Petitioner would receive a harsh sentence. The trial record indicates that the court had even made an admonition to that effect. The co-defendant and Petitioner were both convicted. The co-defendant was placed on probation and Petitioner was sentenced to a five-year term of imprisonment.

Finally, Petitioner was not advised of his right to appeal.

Under all the circumstances Petitioner did not receive effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the Constitution.

Bona Fide Doubt of Competency

8. Petitioner has heretofore filed a petition for a Writ of Habeas Corpus on the ground that he was in fact incompetent at the time of his trial and sentencing in 1960.

A hearing before the Hon. Morris E. Lasker was held on December 8, 1972, in which Petitioner was given an opportunity to attempt to prove nunc pro tunc that he was incompetent at the time of his trial and sentencing in 1960. In denying the petition the District Court said that it was virtually impossible to decide nunc pro tunc whether or not Petitioner was competent after the passage of twelve years and it therefore concluded that Petitioner had not borne the burden of

proving that he was incompetent in 1960. (See Opinions of the District Court, Exhibits E and F.) The Court of Appeals summarily affirmed without opinion the denial of the prior petition, and certiorari was denied.

9. The prior habeas corpus hearing does not bar a hearing on the present issue for the following reasons.

Petitioner does not now seek to establish that he was incompetent in 1960 but rather that under Pate v. Robinson, 383 U.S. 375 (1966) the trial court and the State had sufficient knowledge of Petitioner's prior medical history of mental illness so as to have required as a matter of Due Process that the court sua sponte or the State by its own motion seek a determination of Petitioner's competency.

10. That sufficient evidence was available to have constitutionally required a determination of competency to have been made under Pate v. Robinson was admitted by the State in a letter to Hon. Morris E. Lasker dated February 5, 1973 (Exhibit G):

"* * * I agree that under People v. Bangert, 22 N.Y.2d 799 (1968), a trial court has an obligation to make some inquiry into a defendant's mental condition at the time of sentencing, when it appears in a pre-sentence report that a defendant has a history of mental illness. I also agree that People v. Hudson, 19 N.Y.2d 137 (1967), appears to give retroactive application to Pate v. Robinson.
* * *

"Accordingly, * * * petitioner is technically correct in stating that the 1960 trial court was bound to make some inquiry into petitioner's mental state when an indication of mental illness appeared in the pre-sentence report
* * *."

The State's concession was based on the fact that Petitioner's attorney did advise the court at the time of sen-

tencing that Petitioner had been committed to a state hospital for five years and that the presentence report did disclose to the court that Petitioner had a "history of mental illness", had been receiving psychiatric care from 1953 until his arrest, had been in several state institutions, had been diagnosed "as a psychopathic personality with brain damage", had an "EEG [that] was abnormal, was "below average in intelligence", and suffered from "emotional flatness" (a major symptom of his schizophrenia) since his youth. (See 1960 Presentence Report, Exhibit H.) Also, prior to sentencing, the Brooklyn Aftercare Clinic contacted the court to advise it of Petitioner's history of mental illness (Brooklyn Aftercare Clinic Report, Exhibit I); a history which upon even superficial examination would have revealed that in 1953 Mayo had been certified as "mentally ill" (Exhibit J). Significantly, at the 1972 habeas proceeding the psychiatrist who examined Mayo after he entered the Elmira Reformatory pursuant to the 1960 sentence reported that in 1960 Mayo was unaware or incapable of fully appreciating the impact of his crimes. (1972 Statement of Dr. Leonard J. Bolton, Exhibit K.) Upon information and belief, Petitioner's medical records were never sought or examined by the court or the State, although they were in the custody of the State.

11. The prior habeas corpus hearing did not cure the failure to determine Petitioner's competency in 1960 for two reasons. First, no affirmative determination of competency was made as required by Pate v. Robinson. The District Court concluded only that the Petitioner had not sustained his supposed burden of providing himself to have been incompetent many years before. But in proceedings required by Pate v. Robinson it is the State, and not the Petitioner, that must bear the burden of establishing nunc pro tunc that the Petitioner was competent.

Although the question of whether this was a Pate v. Robinson case was raised on appeal by Petitioner's newly appointed counsel, the District Court had not expressly considered the issue and the Court of Appeals affirmed the denial of the prior petition without opinion. Thus the basis of the Court of Appeals' decision on this issue, if it was reached, is not known. Moreover, the principles established in Pate v. Robinson were recently reaffirmed by the Supreme Court in Drope v. Missouri, 420 U.S. 162 (1975).

For the reasons stated by Judge Lasker in his prior decision, information contemporaneous with the Petitioner's trial and sentencing sufficient to make a fair and accurate determination does not exist. Accordingly, should the District Court now find that the failure to determine Petitioner's competency at the time of his trial and sentencing in 1960 was in violation of Petitioner's constitutional right to Due Process under Pate v. Robinson and Drope v. Missouri, the Writ must issue and the Petitioner be resentenced subject to the State's right to retry Petitioner promptly after a determination of present competency.

12. If Petitioner were resentenced, under former Section 2189 of the Penal Law he would be subject to a minimum sentence of not less than one year and no more than ten years and a maximum sentence of no more than twenty years. Petitioner's current sentence is fifteen to twenty-five years. Even if re-sentenced to the maximum term, Petitioner would be immediately eligible for parole.

13. Petitioner was represented by the following court appointed attorneys with respect to prior judicial proceedings:

- a. 1960 trial - Michael Washor, 16 Court Street, Brooklyn, N.Y.

- b. 1965 trial - Michael C. Pollin, 401 Broadway, New York, N.Y., and David R. Rubin, address unknown.
- c. 1967 Coram Nobis Proceeding and Appeal - Simon Chrein, Milton Adler, Joel Berger, and Alice Daniel, then of the Legal Aid Society.
- d. 1970 Coram Nobis Proceeding, Resentencing and Appeal - Steven Mendelsohn, William I. Hellerstein and Robert Kasanof, then of the Legal Aid Society.
- e. 1972 Habeas Corpus Proceeding -
 - i. District Court: Howard Matz, U.S. Attorney's Office, Los Angeles, California.
 - ii. On Appeal: James B. Kobak, Jr., One Wall Street, New York, New York, and Richard P. Caro, 225 East Cadman Plaza, Brooklyn, New York.

14. For the reasons stated above, Petitioner respectfully requests the court to grant this petition for a Writ of Habeas Corpus.

James B. Kobak, Jr.
James B. Kobak, Jr.

SUBSCRIBED and SWORN to before
me this ^{March} ~~24~~ day of ~~January~~, 1976.

Stephen J. Soatti
Notary Public

STEPHEN J. SOATTI
Notary Public, State of New York
No. 4620032
Qualified in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
ex rel. VICTOR MAYO,

Petitioner,

-against-

76 Civ.

ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility
at Stormville, New York,

Respondent.

EXHIBITS IN SUPPORT OF PETITION
FOR A WRIT OF HABEAS CORPUS

JAMES B. KOBAK, JR., ESQ.
Attorney for Victor Mayo, Petitioner
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New York, New York 10005
Telephone 943-6500

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- B. 1960 Sentencing Transcript
- C. 1972 Habeas Corpus Hearing Transcript
- D. Psychiatric Report of Dr. E. G. Piana, Astor Home for Children, March 19, 1953
- E. District Court 1972 Habeas Corpus Opinion (70 Civ. 2022) Filed December 8, 1972
- F. District Court 1972 Habeas Corpus Memorandum Opinion (70 Civ. 2202) Dated August 23, 1973
- G. Letter from Hillel Hoffman, Assistant New York Attorney General, to Hon. Morris E. Lasker, February 5, 1973
- H. 1960 Presentence Report
- I. Brooklyn Aftercare Clinic Report (1960)
- J. 1953 New York State Department of Mental Hygiene Certification of Mental Illness
- K. 1972 Statement of Dr. Leonard J. Bolton, Psychiatrist, Elmira Reformatory (1960)

COUNTY COURT : KINGS COUNTY

TRIAL TERM - PART IV

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

MAENIE CAMPBELL :

VICTOR MAYO :

Defendants. :

(Ind. No. 1178/60 : Rob. 1; Aslt. 2; Pet. Lar.)

Brooklyn, New York
September 12, 1960

Before:

HONORABLE HYMAN BARSHAY, County Judge

Appearances:

ALBERT DE MEO, ESQ.,
Assistant District Attorney
For the People

D. T. BERMAN, ESQ.,
Attorney for Deft. Campbell

M. WASHOR, ESQ.,
Attorney for Deft. Mayo

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Joseph Barbella
Court Stenographer

1
2 MR. DE MEO: The People move the case of The
3 People of the State of New York against Mannie
4 Campbell and Victor Mayo, Indictment No. 1178-60.

5 THE COURT: Mr. Campbell and Mr. Mayo, both
6 please rise.

7 Have you been advised by your respective
8 counsel that you may be tried by a Judge and Jury
9 or a Judge alone, and the choice is strictly and
10 voluntarily your own? Have you been so advised?

11 DEF. CAMPBELL: Yes.

12 DEF. MAYO: Yes.

13 THE COURT: Do you fully understand?

14 DEF. CAMPBELL: Yes.

15 DEF. MAYO: Yes.

16 THE COURT: What is your wish, Mr. Campbell?

17 DEF. CAMPBELL: Yes.

18 THE COURT: How do you wish to be tried? With
19 a jury or by a Judge without a jury?

20 Did you talk to him, Mr. Berman?

21 MR. BERMAN: Yes.

22 THE COURT: Let him answer the question.

23 DEF. CAMPBELL: A Judge will be all right.

24 THE COURT: No. I want you to give me a full
25 answer, not "A judge will be all right."

1
2 Do you wish to be tried by a Judge and jury or
3 by a Judge alone?

4 DEF. CAMPBELL: By a Judge alone.

5 THE COURT: How about you, Mr. Mayo?

6 DEF. MAYO: No jury.

7 THE COURT: Would you like to be tried by a
8 Judge alone?

9 DEF. MAYO: Yes.

10 THE COURT: Did you sign your waiver?

11 DEF. MAYO: Yes.

12 THE COURT: Did the lawyer see you sign it?

13 DEF. MAYO: Yes.

14 THE COURT: Counsel, did you advise your
15 respective clients?

16 MR. BERMAN: Yes.

17 THE COURT: Did they fully understand?

18 MR. BERMAN: Yes.

19 THE COURT: And that you are acting on their
20 behalf and they wish to be tried by a Judge alone?

21 MR. BERMAN: Yes.

22 THE COURT: Proceed.

23 Mark it in evidence.

24 (Whereupon, two waivers were marked respective
25 Court Exhibit 1 and Court Exhibit 1A in evidence.)

1 THE COURT: Mr. De Meo, will you please open.

2 (OPENING STATEMENT ON BEHALF OF THE PEOPLE:)

3 MR. DE MEO: The complainant in this action
4 is Eileen Brown, who, on April 2, 1960, owned and
5 operated a candy store located at 720 Knickerbocker
6 Avenue, Brooklyn, New York.
7

8 At approximately 8:45 P.M., Mrs. Brown was
9 alone in her candy store; all the lights were on;
10 and she was seated in back of one of the counters.
11 There were two counters at that time; the counter
12 for dispensing candy, and a counter for dispensing
13 cigars and cigarettes. In the back of one of these
14 counters was a cash register, and that at about
15 8:45 P.M. had approximately 16 or 17 dollars in
16 change, constituting part of the money that she had
17 put in there and sales made during the time that
18 she was in the store.

19 At about that particular time these two
20 defendants, Mayo and Campbell, walked in. There
21 wasn't a soul in the store other than the complainant
22 herself.

23 Mayo walked directly up to where Mrs. Brown
24 was, and he had in his hand -- in his pocket,
25 simulating, holding an object, and walked right up

1
2 to her and put his hand into her ribs and said,
3 "I want your money." Campbell took a position near
4 the door of the candy store leading out into the
5 street itself.

6 When Mayo said, "I want your money," Mrs.
7 Brown said, "Well, go ahead. It's in the cash
8 register. Don't hurt me."

9 He then proceeded to the cash register, removed
10 whatever monies was in there, approximately \$15 or
11 \$16, and he then says, "Where is your other money?"

12 This second co-defendant, Campbell, likewise
13 says to the complainant, "There must be more money."

14 She said, "Well, look through the drawers. I
15 don't have any more money. All I have is what you
16 took from the cash register."

17 They opened several of the drawers in the
18 store there, and not seeing anything they ask her
19 for cigarettes. She gave each of these two defend-
20 ants a pack of cigarettes.

21 As they were about to leave the store, Mayo
22 belts the complainant right on the jaw.

23 (THE COURT: A woman?) ← *Suppose it was*

24 MR. DE MEO: Yes.

25 Hits the complainant, Mrs. Brown, right on the

1
2 jaw, and I think knocking her to the ground. They
3 then left the premises.

4 She immediately communicated with the Police
5 Department. The police responded, spoke with the
6 complainant, and then made a general investigation
7 in the area.

8 Within about twenty or thirty minutes after
9 the robbery, they saw these two defendants in a
10 bar just a short distance away from the candy store.
11 The detectives arrested the defendants. Mrs. Brown
12 was called, and she, of course, identified them as
13 being the two who had been in her store just prior
14 to being arrested.

15 On the person of each of these defendants,
16 between the two of them, was about eight and a half
17 dollars. Each defendant is questioned by the
18 detective. And the defendant Mayo said that together
19 with Campbell they were looking for money; that they
20 went into this store. And to shorten it, Mayo made
21 a full confession implicating himself in this par-
22 ticular crime.

23 Campbell is questioned, and he likewise said
24 that they were looking for money, went into the
25 store; Mayo is the one who asked for money; he saw

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Mayo strike and hit the old lady.

THE COURT: Tell me what he said about himself.

MR. DE MEO: He shared the proceeds, and he took a position somewhere near the door.

The District Attorney questioned them. In substance they made the statement again to the District Attorney as they made to the detective.

THE COURT: Mr. Berman, do you wish to open?

MR. BERMAN: On behalf of the defendant Campbell, I most respectfully state to the Court that I believe that when all the evidence is in Your Honor will find that although the evidence may confirm essentially what the District Attorney stated in his opening as regards the co-defendant, there will be a lack of sufficient evidence as against the defendant, Mannie Campbell, whom I represent.

I thank the Court for your patience.

THE COURT: Mr. Washor, do you wish to open?

MR. WASHOR: Your Honor, the defendant waives his opening.

THE COURT: Proceed, Mr. De Meo.

MR. DE MEO: Mrs. Brown.

1
2 E I L E E N B R O W N, residing at 720 Knickerbocker
3 Avenue, Brooklyn, New York, called as a
4 witness on behalf of the People, being duly
5 sworn by the Clerk of the Court, testified
6 as follows:

7 DIRECT EXAMINATION

8 BY MR. DE MEO:

9 Q Mrs. Brown, on April 2, 1960, did you own and
10 operate a candy store at 720 Knickerbocker Avenue here in
11 Brooklyn? A Yes, sir.

12 Q Were you in the candy store at about 8:45 P.M.
13 on that particular day? A About.

14 Q Speak up, please. A About that time,
15 yes.

16 Q You were in the candy store about that time?
17 A Yes, sir.

18 Q Was there anybody in the candy store with you
19 at about that time? A No.

20 Q What was the condition of the lights in the
21 candy store? A The store was lighted up. The
22 lights in the window were lit up. The candy store lights
23 all the lights were lit up. Two fluorescent lights in the
24 candy store and the lights on the window. The store was
25 lighted up.

1
2 Q Did you have on that day counters for the sale
3 of candy and cigarettes and cigars? A Yes.

4 Q Counters? A Yes.

5 Q How many counters did you have? A Beg
6 your pardon?

7 Q How many counters were in the store?

8 A Two counters.

9 Q One for candy? A One for candy and
10 one for cigars and cigarettes.

11 Q Did you have a cash register on that day?

12 A Yes.

13 Q Where was the cash register located?

14 A At the back of the counter.

15 Q Inside the store itself? A Inside,
16 yes.

17 Q Now, about a quarter of nine that evening,
18 was there any money in the cash register? A Yes,
19 there was.

20 Q Approximately how much money was in the cash
21 register? A Probably about 16 or 17 dollars.

22 Q When was the last time before a quarter of nine
23 that night did you open the cash register and see what was
24 in it?

25 MR. BERMAN: I object to this as suggestive

and loading.

THE COURT: Overruled.

Q What is the answer, Mrs. Brown? A Well, by the time the last customer -- it may have been ten or fifteen minutes before these boys came in. That's the last time I looked at it because it was a quiet evening.

Q All right.

Did you see money in the cash register? A Yes, sir.

Q Now, would you tell us what happened at about a quarter of nine on the evening of April 2? In your own words, tell us everything. Go ahead. Tell us what happened. A At a quarter of nine?

Q Yes. A Well, that's about a quarter of nine or something near nine o'clock, there was two boys that came into my store.

Q Do you see those two boys today who came into your store? A Yes.

Q Will you point them out? A They are right there, the two boys.

Q Referring to the defendants Mayo and Campbell?

A Yes.

Q Is that correct? A It is.

Q Now, tell us what each one of these two

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defendants did, if they did anything to you. Do you understand now? A Yes.

Q Take your time and tell us what happened.

A Both boys came in. They opened the door. And this boy stood near the door.

THE COURT: Which one?

THE WITNESS: Mr. Campbell, the colored boy.

THE COURT: They both came in together?

THE WITNESS: They came in together.

THE COURT: You saw their faces?

THE WITNESS: Yes.

THE COURT: Proceed, ma'am.

THE WITNESS: And he stood by the door.

Q That's Campbell stood by the door?

MR. BERMAN: I object to that, if your Honor please.

THE COURT: Don't say "he." One is colored.

THE WITNESS: The colored boy stay by the door. He rest his arm on the counter. And the white boy came to the back, to the small candy counter and I was sitting down reading a paper. And I happened to look across, and I asked Mr. Campbell, "What do you want, boys?"

And this boy here, this white boy said -- he

1
2 put his hand in his jacket like that and he pointed
3 to me as though he had a gun.

4 MR. WASHOR: I object.

5 THE COURT: Strike out, "as though he had a
6 gun."

7 He had his hand in his pocket?

8 THE WITNESS: Yes.

9 THE COURT: Indicating how?

10 THE WITNESS: Indicating -- yes, just like
11 that, with his finger through the pocket.

12 Q With his hand pointed --

13 THE COURT: Indicating a forward thrust of
14 the pocket?

15 THE WITNESS: Yes. And I said, "What do you
16 want?" And this boy said --

17 THE COURT: Which boy?

18 THE WITNESS: The white boy said, "We want
19 money."

20 So I said, "There's the register."

21 And I got up off my seat and I walked over to
22 the big counter where the cigars were. And as he
23 came in --

24 Q Whose he? You have two. A The white
25 boy came in. He hit me on the chin. He hit me here and

1

2

he knocked me on the floor.

3

Q When you say --

4

THE COURT: Left side of the chin?

5

THE WITNESS: Yes. This side.

6

Q As he came in, do you mean behind the counter?

7

A As he came in behind the counter, he hit me and he
knocked me on the floor. As far over as the window. And
I got up. And he was taking the money out of the register.

10

Q Whose he? A As the white boy got up --

11

as I got up, the white boy was taking money from the
register.

12

13

THE COURT: Is that the same boy who you say
hit you?

14

15

THE WITNESS: That's the same boy, the white
boy.

16

17

Q Is that the same boy you had identified --

18

A That's the boy.

19

Q (continuing) -- as being the white boy being

20

seated here? A That's the white boy.

21

MR. DE MEO: Indicating the defendant Mayo.

22

Q Where was the defendant Campbell as Mayo was

23

in back of the counter at the register? Where was Campbell

24

at that time? A This boy was standing by the door

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with his hand resting on the counter.

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THE COURT: Did he say anything at all?

THE WITNESS: No, he didn't say anything.

But then --

THE COURT: Did he do anything at all?

THE WITNESS: No, he didn't do anything. He didn't do anything. But then the other -- the white boy, he said, "There's more money than this in the house." And he opened a couple of more drawers. And I told him, "Go ahead and look." And the colored boy said, "Come on, you had enough. Let's have a pack of cigarettes." So I gave him a pack of cigarettes and I gave the white boy a pack of cigarettes.

Q In other words, you gave each one of these two defendants a pack of cigarettes; is that correct?

A Yes, that's correct.

Q Did Campbell ever come in back of the counter where the white boy was? A No. He stayed in the same place.

Q Outside near the door; is that correct?

A Outside of the counter.

Q All right.

What did these two boys do after you gave him -- each one a pack of cigarettes? A They opened the

1 door and left. They walked out.

2 Q Now, when the two defendants -- these two boys
3 left the store? A They left the store, yes.

4 Q Did you look at your cash register? A Not
5 for a few minutes.

6 Q All right.

7 Did you look at the cash register? A I looked
8 at the cash register, sure.

9
10 MR. BERMAN: May it please the Court, the
11 question concerns anything that occurred after the
12 defendants left, and I respectfully object.

13 THE COURT: Overruled.

14 MR. BERMAN: I respectfully accept.

15 Q Did you look at the cash register? A I
16 looked at the cash register.

17 THE COURT: Was the money there?

18 THE WITNESS: No money there, your Honor.

19 MR. DE MEO: All right.

20 Q Now, Mrs. Brown, did you call the police?

21 A I had some boy call the police for me.

22 Q Did the police come to the store? A They
23 came about -- in about ten minutes, yes.

24 Q Did you -- just yes or no now -- did you
25 speak to the police who came to the store? A I did,

1
2 sir.

3 Q All right.

4 Now, Mrs. Brown, did you ever see these two boys
5 or anyone after they had been in your store at about a
6 quarter of nine that night? Did you see them again?

7 A No, I did not until I was called out.

8 Q When was that? A I was called out about
9 9:30.

10 Q That would be in the evening? A Same
11 evening.

12 Q Same evening? A Yes.

13 Q Where did you go? A I went to the beer
14 garden next door.

15 MR. BERMAN: May it please the Court, I beg
16 your Honor's pardon. I most respectfully object
17 to this line of questioning. I believe the District
18 Attorney is referring to something that occurred
19 possibly after the alleged incident. I can't see
20 the competency of it.

21 THE COURT: He is trying, as I gather -- I
22 may be in error -- you called it to my attention --
23 an identification subsequent to the commission of
24 the crime. Isn't that so?

25 MR. DE MEO: That's right.

1
2 THE COURT: What's wrong about that, Mr.
3 Berman? Identification is in issue here by the
4 plea of not guilty, isn't it?

5 MR. BERMAN: That's right.

6 THE COURT: Therefore, she may testify to a
7 prior identification.

8 Proceed. Objection overruled.

9 Q This beer saloon as you said, was that directly
10 next door to your candy store? A Yes, sir.

11 Q Did you go into the beer saloon? A I did
12 go in.

13 Q Did you see in the beer saloon --

14 THE COURT: Did you see anyone in the beer
15 saloon whom you knew?

16 THE WITNESS: This detective that came in for
17 me took me to the beer garden and said --

18 THE COURT: No, no. You must not tell us what
19 anyone said to you.

20 THE WITNESS: No.

21 THE COURT: When you went into the beer garden,
22 did you see anyone there whom you knew?

23 THE WITNESS: I knew these two boys.

24 THE COURT: Which two boys? Point them out.

25 THE WITNESS: Those two boys.

1

2

THE COURT: Indicating the defendants.

3

THE WITNESS: Yes.

4

THE COURT: Who were they? Who were they?

5

THE WITNESS: This colored boy and this white

6

boy.

7

THE COURT: What did they do?

8

THE WITNESS: Well, the detective was in there.

9

THE COURT: No, no. Just answer my question.

10

THE WITNESS: They didn't do anything.

11

THE COURT: Not in the beer garden. What did

12

they do with respect to you?

13

THE WITNESS: I didn't talk to them.

14

THE COURT: No, not in the beer garden. Before

15

you told us a story. Now, are these the two boys

16

who you say did those things to you that you told

17

me about?

18

THE WITNESS: Yes.

19

THE COURT: Are you sure about it?

20

THE WITNESS: Yes.

21

THE COURT: No doubt?

22

THE WITNESS: No doubt.

23

Q Mrs. Brown, from the moment that these two

24

defendants came into your store and until they left, how

25

much time elapsed? How much time? A How much what?

1

2

Q Time?

3

THE COURT: Time.

4

Q How long did they remain in the store?

5

A Maybe about five to ten minutes.

6

Q Five to ten minutes? A Probably five

7

or ten minutes.

8

Q During that time did you look at these two

9

defendants? A Yes.

10

Q Did you see them? A I did.

11

Q Did you see their faces? A I did when I

12

handed them the cigarettes, yes.

13

Q Did you see them before you gave them the

14

cigarettes? A Yes, I did, sir.

15

Q Did you see the defendant Mayo when he came

16

close to you and said, "Give me your money." A Yes,

17

I did.

18

Q Were you face to face with the defendant Mayo?

19

A Yes. He faced me.

20

Q From where you were in back of the counter,

21

were you able to see the defendant Campbell? A Yes.

22

He was right in front of me outside the counter. I was

23

inside.

24

Q Did you see him during that time of approxi-

25

mately five to ten minutes in your store? A Yes.

CROSS EXAMINATION

BY MR. BERMAN:

Q Will you please tell His Honor about how large the store is where you claim something happened.

A How large?

Q Yes. Give us the dimensions, if you don't mind.

THE COURT: The size.

THE WITNESS: The length of the store is from this wall over to the end of this counter.

Q About how large would you say that is?

A Beg your pardon?

Q About how large would you say that is?

A I don't know how many feet. I don't know how many feet long it is. It's a pretty big store.

THE COURT: I have the exact measurements, Mr. Clerk, pasted in my desk. I don't see it any more.

All right, proceed.

MR. DE MEO: Twenty-five feet.

THE COURT: Twenty-five feet.

THE WITNESS: Probably twenty-five feet, your Honor.

Q Could you tell us how wide your store is?

1
2 A It probably is twenty-five feet.

3 THE COURT: How long is it?

4 THE WITNESS: That's the length.

5 THE COURT: How is the width? The length is
6 one direction.

7 THE WITNESS: I know.

8 THE COURT: From front to back. And the
9 width is from side to side.

10 THE WITNESS: Maybe about six feet wide.
11 Maybe more. I didn't measure it.

12 THE COURT: Proceed.

13 Q Is the counter which you described as being in
14 the back of the store near the rear wall away from the
15 main entrance? A No, it's not by the wall.

16 Q About how far away from the rear wall is it?

17 A From the counter where I keep cigarettes, where I
18 have all the compartments, it's just about a foot-and-a-
19 half. I have about a foot-and-a-half inside the counter.

20 Q You have a counter in the front of the store
21 near the door; is that right? A That's the front
22 counter.

23 Q That is the one where you saw Mr. Campbell was
24 standing while this entire incident took place? A Yes.

25 Q With his hand resting on the counter?

1

2 A Yes.

3

Q Could you tell His Honor when the defendants --
4 both of these two young gentlemen, when the defendants
5 came into your store, would you please tell us who came
6 in first? A This white boy came in first.

7

Q Was he running? A Was he what?

8

Q Running. Did he run? A No. He walked
9 very fast.

10

THE COURT: The white boy is Mayo; is that
11 right?

12

THE WITNESS: Yes. Mr. Mayo walked very fast
13 to the back of the counter where the soda is, and
14 I really thought he was getting a soda.

15

Q Did you see him open the door? A Did
16 I see him at the door?

17

Q Did you see Mayo open the door? A I don't
18 know which one opened the door.

19

Q I just asked you if you saw who opened the
20 door. Did you see who opened the door? A This
21 white boy opened the door. The white boy came in first.

22

Q How long after Mayo, the white boy, opened the
23 door and came in did you see the defendant Campbell?

24

A As the boy asked me for the money, I saw Campbell,
25 and I asked him what he wanted. I just said, "Boys, what

1

2 do you want?"

3

Q And the boy asked you for the money?

4

A And the boy said, "We want money."

5

Q When you say the boy asked you for the money,

6

do you mean Mayo, the white boy? A The white boy.

7

Q Yes. And then you saw Campbell; is that

8

right? A Yes.

9

Q Is that what you just said? A Yes, out-

10

side the counter.

11

Q That was in the front counter near the

12

entrance; is that right? A Yes, sir.

13

Q Now, when Mayo asked you for the money, was

14

he near the rear counter? A Yes, he was at the rear

15

counter.

16

Q And he was facing you; is that right?

17

A He was facing me when he asked for the money?

18

Q Did he speak to you in a soft voice?

19

A I said, "Boys, what do you want?" And he said,

20

"We want money."

21

Q Did he speak to you in a soft voice?

22

A Well, it was in a kind of a voice that wasn't too

23

pleasant.

24

Q Did he shout? A He said, "We want

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money." Just like that. More or less it's shouting, yes.

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Q Did he shout? A It was more or less a shout, I'd say from -- in a nice way he said it. He said, "We want money." Just like that.

THE COURT: Indicating a raising of the voice.

THE WITNESS: A raising of the voice, yes.

Q And Campbell said nothing to you at that time?

A No, he didn't say anything.

Q You stated that you gave the defendant Campbell a pack of cigarettes; is that right? A Yes.

Q Did you hand it to him yourself? A I handed it to both of them. Each one had a pack of cigarettes.

Q Did you go over to Campbell near the door and give him it? A I didn't have the compartment of all the cigarettes there. I handed him a pack of cigarettes. And I handed Mayo a pack of cigarettes.

Q Did Campbell take them from you personally?

A He took them from me.

Q Did he ask you for them before you gave them?

A He said he wanted a pack of cigarettes.

Q Did he tell you that that's why he came into the store? A No, he didn't say anything of the sort.

Q All right.

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How many lights are there in the store?

3

A There are two lights in the window, two fluorescent lights. There's one over the big counter and there are two in the back.

6

Q Now, when the boys left, did you have occasion to see who left first? A The colored boy walked out first because he told the white fellow, he said --

9

MR. DE MEO: Wait a minute.

10

MR. BERMAN: I just asked if she had occasion

11

to see --

12

THE WITNESS: Yes, the colored boy.

13

Q Was that after you gave him the cigarettes?

14

A Yes, after I gave him the cigarettes.

15

Q Did he say, "Thank you," and then leave?

16

A I don't think so.

17

Q Did he say anything to you after? A He

18

just left.

19

Q Did he walk out slowly? A He walked out.

20

MR. BERMAN: Thank you. No further questions.

21

THE COURT: Mr. Washor, do you wish to cross-

22

examine?

23

CROSS EXAMINATION

24

BY MR. WASHOR:

25

Q Is it Mrs. Brown or Miss Brown? A Mrs.

1
2 Brown.

3 Q Will you please explain where the two counters
4 are located as you walk in through the entrance of the
5 store? A They are -- you open the door, and there
6 is a door here, and the counter is here as you walk in.

7 Q One of the counters is on the right hand side
8 as you walk in? A Left hand side.

9 Q Both counters are on the left hand side as
10 you walk in? A Yes.

11 Q The counter with the cigarettes and the candies
12 A And the candy.

13 Q Is closest to the door? A That's right.

14 Q And where were you sitting? A I was
15 sitting at the candy counter.

16 Q Closest to the door? A No. The candy
17 store counter is back a little. It's a small counter.
18 The big counter is the cigarette counter. And there is
19 an opening going in -- naturally, inside the counter.
20 And I was sitting down.

21 Q Were you sitting behind the counter? A I
22 was sitting behind the counter, yes, when this boy came
23 in.

24 Q Approximately how high is the counter?

25 A Well, I had -- there was two pretzel cans and I sat

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on the pretzel can.

3

4

Q Would you say the counter is about three feet in, four feet. A About the height of this. From this floor to this.

6

THE COURT: About three feet?

7

THE WITNESS: About three feet.

8

Q Were you sitting on a regular chair?

9

A No. I was sitting on two pretzel cans. And that was higher. It was as high as the counter.

11

Q Were you able to overlook -- or look over

12

the counter? A Yes.

13

Q From where you were sitting? A Yes.

14

Q Could you see the door directly? A Yes,

15

sure. I can see my door from any place I sit.

16

Q Were you watching the door? A I was

17

looking at the paper. And as the door opened, I looked up.

19

Q Where is the soda pop in the store? A The

20

soda counter is further back from the small candy counter.

21

It's at the back.

22

Q It's all the way in back of the store?

23

A Yes.

24

Q When the defendants came in, did the defendant

25

Mayo, the white boy, did he walk directly over to you and

1
2 say to you at that time -- A Yes.

3 Q (continuing) -- "We want money." A Yes.

4 Q Mrs. Brown, do you recall testifying when the
5 District Attorney was asking you questions that the
6 defendant Mayo, the white boy, proceeded to the back of
7 the store, and you thought he was taking a soda? A I
8 thought he came in for a soda when he walked in so fast.

9 Q Did you walk to the back of the store?

10 A To the back of the store.

11 Q Then he did not go from the door directly over
12 to you? A No. I was sitting behind the counter.

13 Q Please just answer my question. A Yes.

14 Q Did he take a soda? A No, he did not.

15 There is an ice cream soda --

16 Q Did he open the counter where the soda might
17 be or the ice cream might be? A Yes, where the ice
18 cream --

19 Q Did you see him put his hand -- A No.
20 He stood behind me where I was sitting. The candy counter
21 and the ice cream meet.

22 Q And then he walked directly behind you and
23 said to you -- A That's right. And he said, "We
24 want money." And when I asked them what they wanted --

25 Q You testified when the District Attorney was

1 asking you that the white boy, the defendant Mayo, walked
2 over to you and stood directly in front of you. A No,
3 not right over me. I was sitting down when he came right
4 at the back of me.
5

6 Q When did you ask the defendant, "What do you
7 want?" A Right as he came behind me. As he walked
8 over to me.

9 Q Did you put your paper down and get up?
10 A Yes, I did.

11 Q What did you say to him when he said, "We want
12 money." A I said -- I got up. "There's the register

13 Q Where is the register? A The register
14 is behind the big counter.

15 Q Is the big counter the first counter as you
16 walk in? A The front counter. That's right.

17 Q And when the defendant, the white boy, Mayo,
18 walked over to the register, what did you do? A I
19 got up and I said, "There's the register." And where
20 the opening is, he came in.

21 Q You don't understand the question.

22 When the white boy walked towards the register and
23 allegedly opened the register -- A Yes.

24 Q (continuing) -- and took money out --

25 A He didn't --

1

2

Q (continuing) -- what did you do? A He

3

did not open the register until he hit me.

4

Q I didn't ask you that.

5

MR. WASHOR: I ask that the answer be

6

stricken.

7

THE COURT: Denied.

8

THE WITNESS: What did I do? I stood

9

beside --

10

Q Did you follow -- A I walked over in

11

front of him. He was right in front of me. And I stood

12

there. And the register was here. And he took the money

13

from the register. I stood there behind the counter.

14

There was nothing else I could do.

15

Q Mrs. Brown, you just said that the defendant

16

Mayo struck you and you fell to the ground? A Yes,

17

he did.

18

Q Well, if he struck you and you fell to the

19

ground, then you could not have walked over to him at the

20

same time. A I said I got up off the seat from the

21

small counter. And as I did, there is an opening going

22

inside the counter. And that's when he hit me. And he

23

knocked me over as far as over to the end of the counter.

24

THE COURT: How were you facing him when he

25

struck you, as you say?

1
2 THE WITNESS: I wasn't facing him. I was
3 just walking over to show him. I said, "There's
4 the register." And as I told him that, he hit me
5 in the face.

6 THE COURT: Did you see who hit you?

7 THE WITNESS: Yes. The white boy.

8 THE COURT: Who is it?

9 THE WITNESS: The white boy.

10 Q Mrs. Brown, where were you standing when you
11 got hit? A I was not standing. I was walking over
12 to the register to -- I said, "There's the register."
13 From there the little counter to the big one, the register
14 is inside the big counter. And he hit me as I walked over
15 to where the opening is.

16 Q Was he standing behind you as he hit you?

17 A No. I didn't expect him to hit me.

18 Q I didn't --

19 THE COURT: Where was he standing when he hit
20 you?

21 THE WITNESS: He was coming inside to get to
22 the register.

23 THE COURT: How was he? Were you facing
24 each other or were you to the side?

25 THE WITNESS: To the side. I was walking over

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to show him the register when he hit me.

Q Mrs. Brown, you say that he came from the front of the counter through the entrance there, the little entrance between the two counters, when he hit you?

A Through the opening, yes.

Q Didn't you just a moment ago say that after the defendant allegedly opened the door to where the soda and ice cream are, he stood behind you? A He was standing behind me when he first came in. When he first came in, that's where he stood and asked for the money.

Q Mrs. Brown, when he first walked in, he didn't walk over to you? He walked over to where the soda was?

A That's what I am saying. He walked right over to where the soda is.

Q Where were you sitting in relation to the soda? A I was sitting here behind the counter.

Q Approximately how far away? A I was right behind the counter and he put his hand over it. I have a little case on top where I keep all the pretzels and ice cream cups and things. And he put his hand in there. And he said, "We want money." That's where I was sitting. That's where he faced with his hand in his pocket.

Q When did you first notice that the money was

1
2 missing, Mrs. Brown? A After they left. Just
3 when they left.

4 Q Did you look at it immediately? A I
5 looked at it when they -- I couldn't look at it when they
6 were in there.

7 Q Did you wait some time? A About a few
8 minutes.

9 Q Was there anybody in the store during that
10 time at all? A Nobody at all.

11 Q Did you yell for help at any time? A I
12 didn't. I didn't yell for help.

13 Q How soon afterwards did someone come into
14 your store? A About five or ten minutes.

15 Q You stood in the store alone for about five
16 or ten minutes? A I figure I give them a chance to
17 go away. I figured I didn't want anything to happen to
18 me and my two little girls.

19 Q Did you tell the little girls? A I told
20 them to go to the delicatessen and have Richard come over.
21 And when Richard came over I said I was held up. And I
22 told him to call the police, the 83rd Precinct Police.

23 THE COURT: So he is the boy who called the
24 police?

25 Any further cross?

MR. WASHOR: No further cross.

THE COURT: Step down, ma'am.

(The witness excused.)

MR. DE MEO: Detective.

D E T E C T I V E V I N C E N T M C C A R T H Y,
Shield #791 83rd Squad, Police Department,
City of New York, called as a witness on
behalf of the People, being duly sworn by the
Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. DE MEO:

Q Detective Mc Carthy, on April 6, 1960, did
you speak with the complainant, Mrs. Brown? A I did.

Q What time was that? A About 8:50 P.M.

Q Where? A At a candy store located at
720 Knickerbocker Avenue.

Q Thereafter did you conduct an investigation
and ultimately take both of these two defendants in o
custody? A I did.

Q Where was it that you took both of these two
defendants into custody? A In a bar and grill
located at 716 Knickerbocker Avenue.

Q How far is that from 720 Knickerbocker Avenue?
A About thirty feet.

1 Q Did you search the defendants in the bar?

2 A I did.

3 Q What did you find first on Mayo? A On
4 the defendant Mayo, I found \$5.25.

5 Q Did you speak to the defendant Mayo at that
6 time in bar? A I spoke to him then, yes, sir.

7 Q All right.

8 Was the defendant Campbell present? A Campbell
9 was present.

10 Q Did Campbell participate in the conversation
11 that you had with Mayo? A No, not at this time.

12 MR. DE MEO: Then the statement as to Mayo is
13 only binding on Mayo.

14 THE COURT: It's only offered as to Mayo.

15 MR. DE MEO: I said that.

16 Q Now, Detective Mc Carthy, tell us the conversa-
17 tion that you had with the defendant Mayo alone. Do you
18 understand? A I asked the defendant Mayo was he in
19 company with the colored boy and did he go into the candy
20 store two doors away.

21 MR. BERMAN: Will you have the witness speak
22 up?

23 THE COURT: Yes, speak up.

24 THE WITNESS: I am sorry.

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Q Go ahead. A The defendant Mayo, I asked the defendant Mayo was he in company with the defendant Campbell and did they go to a candy store at 716 Knickerbocker Avenue, take some money from the woman, the proprietor. He said he did not; he was not there at all. But later on --

THE COURT: No, not later on. What else did you say?

THE WITNESS: That was all.

Q That was the conversation in the bar?

A Yes.

Q Did you speak to Campbell? A Not at that time.

Q Did you or another member of the Police Department proceed to get the complainant, Mrs. Brown?

A Yes.

Q Who was that? A Detective Molaine.

Q Is that your partner? A Yes.

Q Did the complainant come to the bar and grill? Just yes or no. A Yes.

Q Now, just yes or no, at the time that the complainant came to the bar and grill, were these two defendants still in the bar with you? A Yes.

Q All right.

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Then did you take both of these two defendants
to the 83rd Detective Squad? A Yes, sir.

Q Did you again interrogate the defendant Mayo?

A Yes, sir.

MR. DE MEO: Again, any statement, if there is
is binding only as to Mayo.

Q The defendant Mayo? A Yes, sir.

THE COURT: It's offered -- it's not binding.
It's offered as to Mayo.

MR. DE MEO: That's right.

Q Did he make a statement to you? A Yes,
he did.

Q All right.

What was the conversation that you had with the
defendant Mayo at the squad office? A I asked the
defendant Mayo to tell me what happened, and he stated
that he entered the candy store by Mrs. Brown, and that
he held his hand in his coat pocket, and he told the
woman he needed some money, and that he went behind the
counter and took the cash register and took what was in it,
and he said he struck the woman, and she gave him, the
woman, a pack of cigarettes, and he left.

Q Is that the entire conversation? A That's
right.

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THE COURT: Did you ask him how much he got?

THE WITNESS: He said about 15 or 16 dollars.

He's not sure.

THE COURT: Did you ask him what he did with it?

THE WITNESS: Yes.

THE COURT: Tell us.

THE WITNESS: He said he divided the money with his friend Campbell.

Q I think you said that when you first searched the defendant Mayo in the bar, you found some money?

A Yes.

Q Did you question him concerning the monies you found on his person in the bar? A No, not at the bar.

Q Was that -- A Not in the bar.

Q I know. I say in the squad office? A In the squad office.

Q What if anything did he say as to the amount of money that he had on his person? A He said this is the money that is left from the money he got in the candy store.

Q Did you ask him what he got -- what he did with the money? A He said he had spent it.

Q And some he had given to the co-defendant Campbell.

THE COURT: We must draw all of this out of you. I must have all the details.

Q Is that the entire statement? A With Mayo.

MR. DE MEO: At this time I would like to offer in evidence or deemed marked --

THE COURT: For identification at present.

MR. DE MEO: Yes.

Q How much was it? A \$5.25.

Q As to Mayo? A Yes.

MR. DE MEO: For identification.

THE COURT: At present only.

MR. DE MEO: That's what I said.

Q They consist of what? A A \$5 bill and 25 cents in coins.

Q A \$5 bill or 5 singles? A A \$5 bill.

MR. DE MEO: All right, that will be 1 for identification.

(Whereupon, a \$5 bill and 25 cents in coins was deemed marked People's Exhibit 1 for Identification.)

Q Now, when you got the defendant Campbell to

1
2 the 83rd Detective Squad, did you have a conversation
3 with Campbell? A I did.

4 Q What was the conversation that you had with
5 the defendant Campbell? A He stated that in the
6 company with his friend he went to the candy store for
7 the purpose of obtaining some money. He said he stood
8 by. He didn't do anything.

9 Q Go ahead. A And when Mayo took the
10 money, they both left the premises.

11 Q Did you ask Campbell if he saw what if any-
12 thing Mayo did? A I asked him if -- did he get
13 any money from Mayo. He stated yes. He gave him several
14 dollars. He stated he didn't know the exact amount.

15 Q Did you ask Campbell, if you did, what was
16 the purpose of going into the candy store at 720?

17 A I just stated that. I stated Campbell said that
18 he went in there with the co-defendant Mayo to the candy
19 store for the purpose of getting some money.

20 Q Now I heard you. I am sorry I didn't hear
21 you. All right.

22 Did he tell you how much he had gotten from Mayo?

23 A He said approximately 5 or 6 dollars.

24 Q All right.

25 Now, you found some on Campbell's person when you

first searched him at the bar and grill; is that correct?

A That's right.

Q Did you ask him, Campbell, questions concerning the money that you found on his person? A He said this was the balance of the money that was given to him by Mayo.

Q All right.

And did you ask him if that was the balance of the money that had been taken from the complainant, Mrs.

Brown? A I didn't ask him that, no.

Q All right.

How much did you find on his person? A \$3.18. Two \$1 bills, and the balance of small change.

MR. DE MEO: May we have that marked for identification?

(Whereupon, two \$1 bills, and eighteen cents in coin, were deemed marked as People's Exhibit 2 for Identification.)

Q Is that the entire conversation you had with both of these defendants? A Yes, that's right.

CROSS EXAMINATION

BY MR. BERMAN:

Q Officer, at the time that you spoke to Campbell when you were in the squad room, detective squad

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room -- A That's right.

Q (continuing) -- were you alone with him?

A No, I was not.

Q Did you -- will you tell us how long a period of time did you speak with him? A Twenty minutes, a half-hour.

Q I see.

Did he tell you at the beginning of the conversation that he had gone in with Mayo to get money? A Just about, yes.

Q At the beginning of the conversation?

A Just about the beginning.

Q Did he mention to you anything as part of the conversation that he had gone in to get a pack of cigarettes? A No, he did not.

Q Did he say to you that he got a pack of cigarettes? A No, he did not.

Q Did Campbell tell you that he did not know that Mayo was going to rob the lady? A He did not.

Q Did he tell you that he had just gone along with Mayo for a walk and suddenly decided to get a pack of cigarettes? A He stated he went into the candy store with Mayo to get some money.

Q Did he tell you what I just asked you?

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2 A No.

3 MR. BERMAN: No further questions.

4 CROSS EXAMINATION

5 BY MR. WASHOR:

6 Q When you examined or questioned the defendant
7 Mayo, did you notice if -- you knew at this time, if you
8 recall, whether or not he was intoxicated? A He was
9 drinking.

10 Q Would you say -- A But I wouldn't say
11 he was intoxicated.

12 Q Did you question him as to how long he had
13 been drinking? A I asked him how much he had been
14 drinking. He said he didn't know. He had been drinking
15 for a few hours.

16 MR. WASHOR: No further questions.

17 THE COURT: Step down.

18 (Witness excused.)

19 THE COURT: Did you show the statement to
20 each counselor?

21 MR. DE MEO: I will show them now.

22 Mr. Washor advises me that as to the state-
23 ment of Victor Mayo --

24 MR. WASHOR: No stenographer.

25 MR. DE MEO: So that if the stenographer were

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2 called, Mr. Arthur Drucker, he would testify in
3 substance that he was the stenographer at which
4 time the Assistant District Attorney Fitzgerald
5 questioned the defendant Mayo; that certain
6 questions were put to him; that the defendant made
7 certain answers to the questions; that he took them
8 down stenographically and thereafter he transcribed
9 the stenographic notes, and that the statement that
10 I am now offering is a true and accurate reproduction
11 of his original stenographic notes of the questions
12 put to the defendant and the answers made by him.

13 THE COURT: So stipulated?

14 MR. WASHOR: So stipulated.

15 THE COURT: Mark it.

16 (Whereupon, statement of the defendant
17 Victor Mayo was received in evidence as People's
18 Exhibit 3.)

19 THE COURT: I take it, you do after consulting
20 with your client.

21 MR. WASHOR: I am sorry, your Honor. Yes,
22 that's right.

23 THE COURT: What do you say, Mr. Berman?

24 MR. BERMAN: Yes, your Honor.

25 THE COURT: Any stipulation with respect to

1
2 the --

3 MR. BERMAN: With the exception of the two
4 questions and answers. I can stipulate except for
5 two questions and answers. I was just about to
6 advise the District Attorney to that effect.

7 THE COURT: Show it to him.

8 Proceed. Do you want to get the stenographer?

9 MR. BERMAN: Please. I am trying to avoid
10 calling the stenographer. There is one answer that
11 the witness says he doesn't remember.

12 THE COURT: Let's see it.

13 (Conference held at the bench.)

14 THE COURT: You will have to get the steno-
15 grapher.

16 All right, People rest subject to this?

17 MR. DE MEO: Yes. I will call the stenographer
18 tomorrow morning.

19 THE COURT: While you are here, come up, Mr.
20 Washor.

21 (Conference held at the bench.)

22 THE COURT: People rest as to Mayo.

23 MR. DE MEO: Yes.

24 THE COURT: Motions, Mr. Washor?

25 MR. WASHOR: At this time the defendant Victor

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2 Mayo moves for an acquittal on the grounds that
3 the People had failed to make a prima-facie case.

4 THE COURT: Motion denied.

5 MR. BERMAN: On behalf of the defendant
6 Campbell --

7 THE COURT: I am not ready for your motion.
8 You don't want to stipulate.

9 MR. BERMAN: I thought you had concluded.

10 THE COURT: The case is with you, Mr. Washor.
11 Proceed.

12 MR. WASHOR: Your Honor, the defendant rests.

13 THE COURT: Now, with respect to Mr. Berman's
14 client, Mr. De Meo, you will get the stenographer.

15 MR. DE MEO: Yes.

16 THE COURT: All right. Both defendants
17 remanded.

18 Have him here the first thing in the morning.

19 (Whereupon, an adjournment was taken to
20 Tuesday, September 13, 1960.)
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COUNTY COURT : KINGS COUNTY

TRIAL TERM - PART IV

-----x
THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

MANNIE CAMPBELL :
VICTOR MAYO :

Defendants. :

-----x
(Ind. No. 1178/60 : Rob. 1; Aslt. 2; Pet. Lar.)

Brooklyn, New York
September 13, 1960

B e f o r e :

HONORABLE HYMAN BARSHAY, County Judge

Appearances:

ALBERT DE MEO, ESQ.,
Assistant District Attorney
For the People

D. T. BERMAN, ESQ.,
Attorney for Deft. Campbell

M. WASHOR, ESQ.,
Attorney for Deft. Mayo

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2 THE COURT: Where is your stenographer?

3 MR. DE MEO: I left word, your Honor. When
4 I left here I went back to the office and personally
5 asked to have Mr. Drucker, the stenographer, here
6 this morning at 10:00 o'clock. I have been trying
7 since 5:30. I even sent a radio car to his home to
8 get him down. I don't have him here at this moment.

9 THE COURT: Well, did you get him at all?

10 MR. DE MEO: We have been trying on the
11 telephone since 9:30. It's a busy signal. I must
12 assume that the telephone is off the hook. Mr.
13 Newman had the local police send a radio car to his
14 home.

15 THE COURT: Does he still insist on a steno-
16 grapher?

17 MR. BERMAN: It wasn't a question of insisting.
18 It wasn't a question of stipulating. Because of
19 what the defendant told me, I would be willing to
20 have it admitted to that exception.

21 THE COURT: No, no exceptions.

22 Next case, please.

23 We will wait for the stenographer. I want an
24 answer from the stenographer.

25 Call your next case.

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(Recess taken.)

MR. WASHOR: Your Honor, I ask for an adjournment until Thursday morning.

THE COURT: No. This afternoon at 2:30.

(Recess taken.)

* * *

1 (L. Lehman, CSR)
2 Ct. Reporter.)
JLB.

50.
2:30 O'clock P.M.

(After Recess, trial resumed)

3 MR. DE MEO: May I reopen the People's
4 case?

5 THE COURT: Yes.

6 MR. DE MEO: And put the stenographer
7 on the stand?

8 THE COURT: Yes.

9 MR. DE MEO: Mr. Drucker, take the
10 witness stand, please.

11 ---

12 A R T H U R D R U C K E R,
13 residing at No. 1644 East 21st Street, Brooklyn,
14 New York, called as a witness on behalf of the
15 People, being duly sworn by the Clerk of the
16 Court, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. DE MEO:

19 Q Mr. Drucker, are you employed by the
20 District Attorney's Office of Kings County as a
21 hearing reporter attached to the Investigation
22 Bureau?

23 A I am.

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Q And were you acting in that capacity
on April 3, 1960?

A Yes, sir.

Q On that day, did you as a hearing reporter
attend with Assistant District Attorney Fitzgerald
at the 83rd Squad, at which time a man named
Mannie Campbell was questioned by the Assistant
District Attorney?

A Yes, sir.

Q Did the Assistant District Attorney put
certain questions to the defendant Campbell?

A He did.

Q And did you record those questions
stenographically?

A I did.

Q Did the defendant Mannie Campbell make
answers to the questions put to him by the Assistant
District Attorney?

A Yes, sir.

Q Do you have the original stenographic
minutes with you of the questions put to the
defendant Campbell and the answers, if any, made
by him to the questions?

A Yes, I have.

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2 Q Will you please read from the original
3 tape, the stenographic minutes, the questions put
4 to this defendant and any answers made by him?

5 A Yes, sir. It is Statement No. 111, Folio No.
6 147. This statement was taken at the 83rd Precinct
7 on April 3, 1960, commencing at about 4:10 A.M.
8 Detective McCarthy Shield No. 791 of the 83rd
9 Squad was present.

10 "BY MR. FITZGERALD:

11 "Q What is your name?

12 A Mannie Campbell.

13 "Q Where do you live?

14 A 255 Greene Avenue.

15 "Q How old are you?

16 A Eighteen.

17 "Q When were you born?

18 A December 3, 1941.

19 "Q Were you in premises 720 Knickerbocker Avenue
20 this evening about 8:45?

21 A Yes.

22 "Q Tell us what you did?

23 A Both of us walked in together.

24 "Q Who was with you?

25 A The other guy in the back there.

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"Q Victor Mayo?

A Yes.

"Q You both went in the candy store?

A Yes.

"Q What did you do?

A Nobody was in there but the old lady. He told the lady he want money. I was near the door. He smacked her. I didn't do nothing. I keep telling him to come on let's go. So we walked -- we ran around, then we came back to this bar. That's where we got caught at.

"Q Did you go in there to get money?

A Yeah.

"Q Did Victor Mayo make believe he had a gun in his pocket?

A He had one hand in his pocket, that's all.

"Q Did you see him raise his pocket when he said he wanted money?

A No.

"Q What did you do with the money when you were in the bar?

A I didn't do nothing with it.

"Q Did you get any of the money?

A Yeah.

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"Q How much did you get?

A I got two dollars and change."

The statement ended at 4:15 A.M.

MR. DE MEO: I would like to have the original minutes that the witness read from marked for identification.

THE COURT: Is it a copy of the exact transcript?

MR. DE MEO: That is what I am coming to go to next.

THE COURT: Do that now.

BY MR. DE MEO:

Q Now I show you this typed statement and I ask you, is this a true and accurate representation of the minutes that you just read into the record?

A It is.

Q You compared it?

A Yes, sir.

Q From the original minutes?

A I did.

MR. DE MEO: Then I offer the typed statement in evidence.

MR. BERMAN: I respectfully object.

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2 THE COURT: What is the ground?

3 MR. BERMAN: It is an unsigned statement
4 and should not be admitted in evidence against the
5 defendant.

6 THE COURT: Motion denied.

7 MR. BERMAN: I respectfully except.

8 THE COURT: It will be received in
9 evidence.

10 (Received in evidence and marked
11 People's Exhibit 4.)

12 THE COURT: Do you want to cross-examine?

13 MR. BERMAN: Yes.

14 THE COURT: Go ahead.

15 CROSS EXAMINATION

16 BY MR. BERMAN:

17 Q Mr. Drucker, from either an examination
18 of your notes or People's Exhibit 4, just received
19 in evidence, could you tell his Honor whether
20 you recall whether the defendant, Mannie Campbell,
21 was sitting or standing at the time he made that
22 statement in your presence?

23 A I have no recollection.

24 Q I now direct your attention to the
25 last question and answer on People's Exhibit 4,

1
2 and ask you whether you recall if the defendant,
3 Mannie Campbell, stated in response to the last
4 question on that transcript: "I got two dollars
5 in my pocket," at the time that you took the answer?

6 A If he would have said it, I would have written
7 it down stenotypically. The answer he gave was
8 "I got two dollars and change."

9 Q Do you recollect that at the time
10 he said that, as you just stated, "I got
11 two dollars and change," whether at that time
12 he put his left hand on the outside of his
13 left pants pocket?

14 A I have no recollection as to that.

15 THE COURT: Let me see that statement.

16 (Paper was handed to the Court.)

17 THE COURT: Is there anything in
18 the examination between the Assistant
19 District Attorney, that you took stenographically,
20 that you omitted?

21 THE WITNESS: No, sir.

22 THE COURT: In a syllable?

23 THE WITNESS: Not a word; no, sir.

24 THE COURT: Is the answer, "I got
25 two dollars and change," responsive to

"How much did you get?"

THE WITNESS: Yes, sir.

THE COURT: No question about that?

THE WITNESS: Yes, sir.

THE COURT: Proceed.

MR. BERMAN: No questions.

MR. DE MEO: The People rest.

MR. BERMAN: The defendant Mannie Campbell
calls the defendant, Victor Mayo, to the stand.

THE COURT: Take the stand.

(Defendant Victor Mayo takes the
witness stand.)

THE COURT: Step up, Mr. Washor?

(Conference at the Bench.)

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V I C T O R M A Y O (Defendant)
residing at No. 1480 Gates Avenue, Brooklyn, New
York, called to the stand by the defendant
Campbell.

THE COURT: The Court will advise
you of your rights. Under the law, you being
a defendant, you have the right to refuse to
answer any questions which in your opinion may
incriminate you. If that is your honest answer,

you do not have to answer if you think any answer will tend to involve you or incriminate you, you do not have to answer. Do you understand my advice?

DEFENDANT MAYO: Yes.

THE COURT: Swear the witness.

(Defendant Mayo duly sworn by the Clerk of the Court.)

THE COURT: I understand your lawyer gave you the same advice I gave you?

DEFENDANT MAYO: Yes.

THE COURT: Am I correct?

DEFENDANT MAYO: Yes.

THE COURT: Your lawyer's name is Mr. Washor?

DEFENDANT MAYO: Yes.

THE COURT: Proceed.

- - -

VICTOR MAYO, testified as follows:

DIRECT EXAMINATION

BY MR. BERMAN:

Q Mr. Mayo, were you in the store which was robbed, about which Mrs. Brown testified?

A Yes, sir.

Q Were you there at the time that the robbery took place?

A Yes.

Q Did you commit the robbery?

A Yes.

Q Was there anybody else in the store at the time while you were there?

A No.

Q Was the lady, Mrs. Brown, there?

A Yes.

Q Now, do you see this young man here, Mannie Campbell- - do you see him now?

A Yes.

Q Do you know him?

A Yes.

Q Did Mannie Campbell rob the store with you?

A No.

MR. DE MEO: I object to the form of the questions.

THE COURT: Did he participate in the robbery with you as your partner?

THE WITNESS: No.

BY MR. BERMAN:

Q Did he go into the store with you?

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A No.

Q Did he follow you into the store?

A No, not right away.

Q Did you plan on robbing the store there
on that day?

A No.

Q Did you plan with Mannie Campbell to rob
that store, or the woman who was there?

A No.

Q Did you divide any money that was taken
from the store by you with Mannie Campbell?

A No.

Q Did you tell Mannie Campbell at any
time prior to your arrest that you had robbed
the store?

A No.

Q Did you get cigarettes from the store?

A Yes.

Q Did you give Mannie Campbell cigarettes?

A No.

Q Did you constantly look at the woman
while you were in the store?

A Yes, I did.

THE COURT: Who hit the woman?

THE WITNESS: I did.

BY MR. BERMAN:

Q Victor, you understand we are only interested in the truth, you realize that?

THE COURT: He took the stand and he swore to tell the truth, and you do not have to go into that. That is what he said he will do.

BY MR. BERMAN:

Q And you at no time discussed robbing this store with Mannie Campbell?

THE COURT: You have already gone over that.

MR. BERMAN: I have no further questions.

THE COURT: You state you committed the robbery all alone?

THE WITNESS: Yes, sir.

THE COURT: Proceed, Mr. DeMeo.

CROSS EXAMINATION

BY MR. DE MELO:

Q How long do you know the defendant Campbell?

A About four months.

Q Did you see him on April 3, 1960, the date of the robbery; April 2nd?

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A Yes.

Q Were you with Campbell at about 3:30 p.m.
on April 2nd?

A Yes.

Q And you say that Campbell did not go
into the candy store with you?

A No.

Q Do you remember being questioned by the
District Attorney, Victor, after you were arrested
by the police?

A No, I don't remember.

Q You don't remember?

A No.

Q Do you remember -- you don't remember
being questioned at all by an Assistant District
Attorney at the 83rd Detective Squad?

A No.

THE COURT: Do you remember being questioned
by the police officer about this case?

THE WITNESS: No.

THE COURT: You don't remember that at all?

THE WITNESS: No.

BY MR. DE MEO:

Q When the police officer arrested you, were

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you with Campbell in a saloon?

A In a saloon? Yes.

Q And that bar and grill, was this a bout one
or two doors away from this candy store; is that
right?

A Yes.

Q Were you drinking with Campbell at that time?

A Not right then; no.

Q Wers you drinking with Campbell at some
time in the bar?

A Yes, sir.

Q When the police took you and Campbell into
custody, did you have some money on you?

A Yes.

Q Did you tell the police officer that that
was part of the monies that you had taken from the
old lady?

A I don't know.

Q Did you take the money from the cash register
after you hit the old lady in the candy store?

A I said, "Yes."

Q What is that?

A The cop said I did.

Q Did you take money from the register?

Mayo - cross

54

Campbell - direct

A I couldn't remember. I don't know. I don't know how to answer.

MR. DE MEO: That is all, your Honor.

THE COURT (To the witness): Step down.

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M A N N I E C A M P B E L L (Defendant)

residing at No. 255 Greene Avenue, Brooklyn,

New York, called as a witness in his own

behalf, being duly sworn by the Clerk of the

Court, testified as follows:

DIRECT EXAMINATION

BY MR. BERMAN:

Q Mannie Campbell, do you know this young man sitting at the counsel table with his lawyer? Victor Mayo?

A Yes.

Q Were you with him on the day that this Mrs. Brown claims she was robbed?

A Yes, I was with him.

Q Were you walking with him on the street before he went into the store?

A Yes.

Q Did you discuss at that time with him robbing Mrs. Brown?

A No.

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Q Or robbing anyone?

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A No.

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Q Or any store?

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A No.

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Q Did you have any discussion with him as you were approaching the store? Did you go near where the store is?

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A Yes, I went near the store.

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Q And do you recall any discussion that you had with Victor Mayo at the time you were going near the store that Mrs. Brown ran?

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A I had no discussion.

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Q Did you talk to Victor Mayo as you were walking along the street?

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A Yes, I was talking to him.

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Q Did you plan with him to rob Mrs. Brown?

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A No.

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Q Did Victor Mayo go into Mrs. Brown's store?

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A Yes, he went in.

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Q Did you go into Mrs. Brown's store?

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A I went in behind him, and the old lady was behind the counter.

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Q Did you go into the store?

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A Yes, sir.

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Q Tell his Honor the truth?

A Yes, I went in.

Q How long after Victor Mayo went into the store did you go into the store?

A I was -- about two or three minutes I went in.

Q When you went into the store, how far did you get into the store?

A Towards the door.

Q Did you go into the store, past the doorway?

A I went in the door and I saw him do like this, and he hit her in the face, and both of them were standing by the cash register. I saw what was he doing and I walked down the street, and that is all I know.

Q Did you see him rob Mrs. Brown?

A I didn't see him take no money.

Q Did you see him take any money from the cash register?

A No.

Q Did you see Mrs. Brown fall down?

A No, I didn't see her. I didn't hear that and I didn't see her fall.

Q Did you get any money from Victor Mayo?

A No, I didn't get any money.

Q Did Victor Mayo tell you he got any money from the store?

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A No.

Q Did he give you any part of the money
that he got from the store?

A No, he didn't give me any money.

Q Are you sure now?

A I am sure.

Q At the time that you left the store,
did you go with Victor Mayo?

A Did I go with him?

Q Did you go with him from the store, or
did he join you?

A He joined me after I left the store.

Q How long after you left the store, did he
join you?

A Oh, about three blocks away when he caught me.

Q He caught up with you about three blocks
away?

A Yes.

Q Was he running or walking, if you remember?

A Walking kind of fast.

Q Did you spend any time with him after
he caught up with you?

A Yes.

Q Did you stay with him?

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2 A I went in the bar.

3 Q Who paid for the drinks?

4 A I paid for my own drinks.

5 Q Did you have any money before you went
6 into the store?

7 A Yes, I had money.

8 Q How much did you have with you before
9 you went into the store?

10 A Before I went into the store? I had about
11 seven d ollars and change.

12 Q How many drinks did you pay for?

13 A I can't remember how many drinks I had.

14 Q About how much money did you spend for
15 drinks?

16 A About four dollars and change.

17 Q Did Victor Mayo spend any money for drinks?

18 A Yes.

19 Q About how much did he have?

20 A I don't know how much he spend.

21 Q Did you stay at the bar until the policeman
22 came or before the detective came?

23 A Yes, I was in the bar.

24 Q Do you recall hearing the District
25 Attorney's stenographer testify to your statement
earlier at the trial?

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A Yes.

Q Now I ask you to please examine People's Exhibit 4.

A Yes.

Q Now about four or five questions up from the bottom of the sheet, there is a question that you answered with the word "Yeah." Can you find that? Can you read?

A Yes.

Q The stenographer testified that you were asked this question and you gave this answer -- listen to me carefully -- if you don't understand me, say so - - this is the question he says you were asked -- "Did you go in there to get money?" That is the question. The answer that he says you gave is the word "Yeah." Now, were you asked that question and did you give that answer at the time you were questioned by the Assistant District Attorney in the Precinct?

A No, I don't remember.

Q There is another question at the bottom of the same sheet, People's Exhibit 4. There is a question and answer, which the stenographer

1 just read off to us. I will read it to you.

2 I will read the question and ask you if you
3 were asked the question and you gave the answer
4 he has down here. "Q How much did you get?

5 A I got two dollars and change." Did you
6 give that answer to that District Attorney when
7 you were questioned by him in the Precinct?

8 A I said I got two dollars and change on me.
9 That is all I got.

10 THE COURT: That is what you say you -
11 said?

12 THE WITNESS: Yes, that is what I said.

13 BY MR. BERMAN:

14 Q Can you tell his Honor at the time you
15 gave that answer, did you mean you received
16 two dollars and change from the money that
17 Victor Mayo stole, or that you had two dollars
18 and change in your possession when the District
19 Attorney asked his question? What did you mean?

20 A I meant that was my own money. I had enough
21 money of my own. He didn't give me no money.

22 Q When you said you "got," did you
23 mean you had?

24 A Yes, I had, my own.
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2 MR. BERMAN: That is all. No
3 further questions.

4 THE COURT: Cross examine.

5 CROSS EXAMINATION

6 BY MR. DE MEC:

7 Q When you were in the store at the
8 time that Mayo was in there, did you see Mayo
9 hit the old lady?

10 A Yes, I seen him hit her on the face.

11 Q And did you say to him, "That's all, let's
12 get out."?

13 A No.

14 Q Did you say anything to him?

15 A I said---- I asked him what was he doing,
16 hitting the old lady, like that, and I turned
17 around and walked out of the door. I don't know.

18 Q How long do you know Mayo, Mannie?

19 A About a year and a half.

20 Q Were you working on April 2nd?

21 A I worked. We was working together in the
22 same job.

23 Q Were you working that day?

24 A Yes, I was working that day.

25 Q What time did you stop working?

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A Three o'clock.

Q Did you tell the detective when he questioned you that you and Mayo were looking for money?

A No.

Q That you went into this candy store?

A No.

Q That he, Mayo, hit the woman and took the money out of the cash register?

A No.

Q And that you got part of the money?

A No.

Q Didn't tell him that?

A I didn't tell him that.

MR. DE MEO: That is all.

THE COURT: Were you ever convicted of a crime?

THE WITNESS: I was convicted?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: On February 28, 1960, were you convicted in the Court of Special Sessions of petit larceny?

THE WITNESS: Oh, yes.

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THE COURT: Both sides rest?

MR. BERMAN: The defendant rests.

MR. WASHOR: The defendant rests.

THE COURT: Motions.

MR. BERMAN: At this time on behalf of the defendant Mannie Campbell, I most respectfully move to dismiss the case on the ground that the People have failed to establish the guilt of the defendant Mannie Campbell beyond a reasonable doubt.

THE COURT: With respect to the first count it is reduced to robbery in the third degree., Motion denied as to each count.

MR. BERMAN: I respectfully except.

MR. WASHOR: The defendant Mayo respectfully moves for a dismissal on the ground that the People failed to prove guilt beyond a reasonable doubt.

THE COURT: As to the first count, I will reduce it to robbery in the third degree. I find each of the defendants guilty of robbery in the third degree, and as to the second count, guilty of assault in the second degree, and guilty of petit larceny under the third count.

MR. BERMAN: Exception.

MR. WASHOR: May I approach the Bench?

THE COURT: Yes.

(Conference at the Bench.)

MR. BERMAN: May I have an exception
noted with respect to the Court's verdict?

THE COURT: Yes.

(Pedigrees of defendants taken by the
Clerk of the Court.)

THE COURT: Defendants remanded.

WITNESSES FOR THE PEOPLE:

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recr</u>
Eileen Brown	8	20	--	--
Det. Vincent McCarthy	34	41	--	--
Arthur Drucker	50	55	--	--

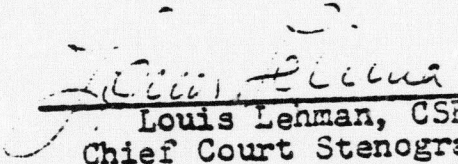
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WITNESSES FOR THE DEFENDANT:

<u>Name</u>	<u>Direct</u>	<u>Cross</u>
Victor Mayo	57	61
Mannie Campbell	64	71

January 31, 1967

I certify that the foregoing is a true
and correct transcript of the minutes of the
trial in the matter of the People vs.
Mannie Campbell and Victor Mayo, Defendants,
before Hon. Hyman Barshay, County Judge,
Kings County; and on file in this Court.


Louis Lehman, CSR
Chief Court Stenographer
Supreme Court, Kings County.

JJBarbella)
L.Lehman)

*Case was not appealed until 1967, when it was learned that I had
a right to appeal my case.*

COUNTY COURT
KINGS COUNTY

Petitioners
GOVERNMENT

-----x
THE PEOPLE OF THE STATE OF NEW YORK

S. Dist. Court
D. of N. Y. /

- against -

MANNIE CAMPBELL
VICTOR MAYO

Defendants.

2th

-----x
(Indicmgt No. 1178/1960: Rob. 3, etc.)

Brooklyn, New York City

November, 14th, 1960.

B E F O R E:

HON. HYMAN BARSHAY,

COUNTY JUDGE.

A p p e a r a n c e s:

David T. Berman, Esq.,
For Deft. Campbell;

Michael Washor, Esq.,
For Deft. Mayo

Louis Lehman, CSR
Official Stenographer.

...

THE CLERK: What is your name?

DEFENDANT: Mannie Campbell.

THE CLERK: If you have any legal or other cause to show why the judgment of the Court should not be pronounced against you, say it now and address yourself to the Court.

MR. BERMAN: No legal cause. May it please your Honor, at this time on behalf of the defendant Campbell, I must respectfully advise your Honor that I spoke to members of his family; I have spoken to his employer, a man who has been victimized and he wants to give him a job.

I tried to get some of the members of his family as well as I could. Some of them are here in Court. I believe that this young man has every basis of hope, and if your Honor will permit me, for complete rehabilitation under the very strict supervision of the Probation Department, I think he will justify the faith of the Court.

He has a job, and his boss told me he will give him an opportunity to work. That

place is a place where this defendant's father works, and he will be constantly watched, and he would be definitely on the way of being a good citizen.

I most respectfully throw this defendant on the mercy of the Court, and ask for extreme leniency.

THE CLERK: What is your name?

DEFENDANT: Victor Mayo.

THE CLERK: If you have any legal or other cause to show why the judgment of the law should not be pronounced against you, say it now and address yourself to the Court.

MR. WASHOR: No legal cause why sentence should not be imposed. At this time, if I may say something in mitigation of sentence; at the time that the defendant was apprehended and up to the present time, the defendant had admitted his involvement in this particular crime. He had admitted it, and had cooperated with the authorities.

He had intended to make a disposition

before the Court, and for reasons beyond his control, he was not able to do so.

I have been in contact with the family, and the mother is present in court. The defendant hopes, and does have an opportunity to have the same job that he had prior to being apprehended.

I would like to bring to your attention the fact that he had from 1952 to 1957, the defendant was in Rocklnd State Hospital. He was placed there by his family.

I have spoken to the defendant on many occasions. The defendant is aware of the severity of the crime, and I ask your Honor to take into consideration his background.

He is an eighteen year old boy, and if we give him this opportunity to prove himself and his family, and the Court, that he can live as normally as possible and not become involved again, I ask your Honor to give him this opportunity.

THE COURT: ot do it for Mayo because he went his candy store and he took money. There was a sixty year old female in charge of the candy store, the woman who works there from six in the morning until ten at night to try to earn a living.

He was not satisfied by taking a few dollars, but he hit her as though he was a prizefighter, and the day will not come when I will forgive that.

MR. WASHOR: May I say something?

THE COURT: Yes.

MR. WASHOR: If you recall, at the time of the trial, the defendant was intoxicated.

THE COURT: That is worse, because he became intoxicated of his own choice. If he needs liquor to give him courage to punch an old woman and knock her to the floor of the candy store; that is worse.

MR. WASHOR: I agree with you, but he

has been incarcerated for eight months/

THE COURT: He will get credit for that. Mayo, Elmira Reception Center, recommendation for short commitment and maximum parole; credit for all time served.

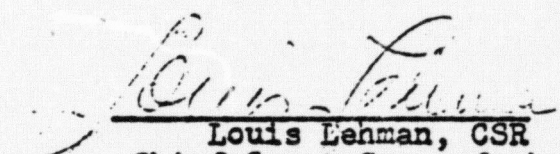
Campbell was the lookout. As a matter of fact, he ran in and he is the one who asked Mayo to stop, that she had enough. Elmira Reception Center, execution of sentence suspended; probation during good behavior, subject to all the provisions of Section 932 of the Code of Criminal Procedure.

October 21, 1966

- 7 -

I certify that the foregoing is a true and correct transcript of the minutes of the sentence of November 14, 1960, in the matter of the People vs. Victor Mayo and another, Defendants, before Hon. Hyman Barshay, County Judge, Kings County; and on file in this Court.

LL


Louis Lehman, CSR
Chief Court Stenographer
Supreme Court, Kings County

mdg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA
ex rel VICTOR MAYO, :
:
Petitioner, :
:
v. : 70 ^{Civ.} [Cr] 2202 (MEL)
:
J. EDWIN La VALLEE, :
Superintendent of the CLINTON :
CORRECTIONAL FACILITY, :
:
Respondent. :

----- -x
Before:

HON. MORRIS E. LASKER,
District Judge

New York, January 17, 1972
10:00 a.m.

APPEARANCES

A. HOWARD MATZ, Esq.,
Attorney for Petitioner

LOUIS J. LEFKOWITZ, Esq.,
Attorney General, State of New York
HILLEL HOFFMAN, Esq.,
Assistant Attorney General

2 THE CLERK: Case called.

3 MR. MATZ: The petitioner is ready.

4 MR. HOFFMAN: The respondent is ready.

5 THE COURT: Gentlemen, I would like to treat
6 this matter informally in the sense of having you explain
7 in ordinary language as much as you can of the case to me,
8 and letting me interrupt you when I feel I need to ask ques-
9 tions, and so on.

10 I would appreciate ^{it} if before you called any wit-
11 nesses each of you would give me your view of the case,
12 what the issues are, and why the matter ought to be dis-
13 posed of in a particular way.

14 Mr. Matz, would you like to tell me?

15 MR. MATZ: Yes, your Honor.

16 May it please the Court, before the petitioner
17 sets forth the contentions that he will be making in this
18 proceeding I think it is useful to explain briefly the
19 procedural background to this case because it is important
20 to the judicial question.

21 In 1960, Mr. Mayo, the petitioner, whom I repre-
22 sent, was convicted of three crimes, one of which was a
23 felony. He was sentenced to prison --

24 THE COURT: What was that crime?

25 MR. MATZ: The felony was third degree robbery.

2 THE COURT: Was this the incident in which he and
3 another young man at the time robbed a keeper of a store
4 and took some cigarettes, money, and so forth?

5 MR. MATZ: Yes, sir, a candy store.

6 THE COURT: I ask because I have read the stipu-
7 lation of facts and some of the reports in that stipulation,
8 too, indicate what that was all about, so I understand what
9 it was all about.

10 MR. MATZ: That was the trial or the proceeding
11 which we will be considering in great detail this morning.

12 In 1966, Mr. Mayo plead guilty to a separate
13 and completely unrelated crime, and Justice Schweitzer of
14 the New York State Supreme Court sentenced him to a term
15 of 15 to 25 years in state prison.

16 He is now serving that term at the Clinton Cor-
17 rectional Facility in Dannemora, New York.

18 Justice Schweitzer's sentence was imposed pursu-
19 ant to the provisions of the old New York Penal Law which
20 provided for multiple offenders treatment to persons who had
21 previously been convicted of a felony, and the sentence took
22 into account the 1960 felony conviction.

23 THE COURT: What would have been the maximum if he
24 had not been declared a second offender?

25 MR. MATZ: The maximum if he had not been a second

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2 offender would have been 20 years, so there is that distinc-
3 tion and difference of time that he is presently serving.

4 In 1967 Mr. Mayo filed an application in the Kings
5 County Supreme Court seeking coram nobis relief and assert-
6 ing for the first time the claim that the 1960 conviction
7 had been obtained at a time when he was not competent to
8 stand trial.

9 Justice Damiani of the Supreme Court denied the
10 application in December of 1967.

11 I ^{shall} [should] introduce a copy of the decision of
12 Justice Damiani.

13 Unfortunately, so few facts were presented at that
14 time in the coram nobis hearing that it is my opinion a full
15 and fair hearing was not provided to Mr. Mayo.

16 THE COURT: Do we have a transcript of those pro-
17 ceedings?

18 MR. MATZ: We do. I understand the transcript of
19 the proceedings is in the current file that the Court has
20 custody of. We could introduce the minutes of the proceed-
21 ings as well.

22 Mr. Mayo appealed the denial of his coram nobis ap-
23 plication and the appellate division affirmed Justice Damiani's
24 decision in June of 1969.

25 This proceeding on the habeas corpus petition was

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commenced in December of 1969 in the Eastern District of New York. Mr. Mayo filed a pro se petition at that time.

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THE COURT: Why was it filed there? Was it just in error?

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MR. MATZ: It was in error, and subsequent to the filing in late May of 1970 Judge Mishler transferred the case to this court for jurisdictional reasons.

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In the meantime, however, and specifically in April of 1970, Mr. Mayo moved in Kings County Supreme Court again for a re-sentence of the first conviction, and this time he alleged that in 1960 he had not been informed that he had a right to appeal the conviction.

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A hearing was conducted in October of 1970 on this claim concerning the right to appeal, and the judge who tried the 1960 case, Justice Barshay, ruled in December of 1970 that Mayo had not been informed of his right to appeal. Consequently, he was re-sentenced nunc pro tunc, his right to appeal was revived, and he in fact filed a notice of appeal.

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In February or March of 1971 the appellate division appointed the Legal Aid Society to represent Mr. Mayo in his State Court appeal, which is currently pending.

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I advised your Honor, and opposing counsel Mr. Hoffman, by letter dated May 25, 1971, of the existence of

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this State Court appeal which had not been in effect at the time the habeas corpus petition was first filed.

As I stated in my letter at that time, in my judgment the existence of this new State Court appeal does not affect this Court's jurisdiction under the exhaustion doctrine because there had been exhaustion at the time the habeas petition was first filed, there had been no objection based or made under the exhaustion doctrine principle at that time, and in any event, the State Court appeal cannot and will not consider the question of Mr. Mayo's competency since it was not raised back in 1960.

On Friday, I contacted the Legal Aid Society and was told that no particular staff attorney there has yet been assigned to represent Mr. Mayo on this appeal and no briefs had been filed.

That sets forth, I think, in salient detail, the procedural background to this case.

Insofar as Mr. Mayo's contentions and claim is concerned, it is his position that the present sentence he is serving is unconstitutional because it is based on a prior conviction, a 1960 conviction, that was obtained at a time when he was not competent to stand trial.

He is not claiming in this proceeding that he was insane back in 1960, although it is probably inevitable that

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there will be testimony concerning his insanity at the time the crimes were committed because it is so closely connected to the question of his competency to stand trial some few months later.

It is Mr. Mayo's contention that he was incompetent to stand trial in 1960 under all of the established tests. He lacked the ability at that time to consult with his attorney with a reasonable degree of rational understanding; he lacked a rational as distinguished from factual understanding of the nature of the proceedings against him. In addition, he was mentally incapable of assisting in his own defense.

There are three aspects to the petitioner's proof which will be introduced at his hearing. The first concerns his condition in 1960.

The second concerns the cause of that condition in 1960.

The third concerns the result of that condition.

Insofar as the condition itself is concerned, in the fall of 1960 and in the immediately preceding summer when he was awaiting trial, Mr. Mayo was a schizoid personality. He suffered from the effects of a prior schizophrenia. He was 18 years old at the time and a full three-quarters of his prior life had been spent in institutions.

He was a lonely, inexperienced and very poorly educated person who was out of touch with reality, out of touch with others and even out of touch with himself.

In addition, most crucially, his skills at communicating with others, especially as to vital information, were very, very severely impaired.

The cause of his condition is linked inextricably to his practically uninterrupted prior history of institutionalization, plus an indication that he suffered from brain damage.

The result is a very unfortunate result indeed. He was incapable of consulting with his attorney at that time. In fact, he did not consult effectively and rationally with the attorney, there was non-disclosure of basic information that, had there been such disclosure, would probably have led to a completely different result and would certainly have led to different efforts on the part of the attorney who represented him at that time.

THE COURT: What proof do you expect to introduce about this? Not about his condition, but about the failure of communication, and so on.

MR. MATZ: It will consist of testimony both from Mr. Mayo and his attorney who represented him in 1960.

As your Honor touched upon before, the obvious

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2 result of this proceeding, should your Honor find that the
3 petitioner's proof is sufficient to establish his claim, is
4 that the present sentence he is serving would have to be va-
5 cated, and he would have to be resentenced as a first of-
6 fender.

7 Since this sentence began in 1966, though I have
8 not scrutinized all the permutations and computations of the
9 sentence thoroughly it is clear he would still be serving
10 time, ^{though} ~~that~~ the maximum sentence would be reduced by an in-
11 determinate period.

12 TRE COURT: Is there any possibility the State
13 would ask, even if I decided in his favor, they be given
14 the opportunity to try him again in regard to that 1960?

15 Mr.Hoffman, does the State have any intention of
16 doing it?

17 MR.HOFFMAN: It is rather difficult. Ten years
18 have elapsed. I think they would have problems.

19 THE COURT: It is unlikely then? Thank you.

20 MR. MATZ: That completes my opening recitation.

21 THE COURT: Thank you, Mr. Matz.

22 Mr. Hoffman.

23 MR. HOFFMAN: Essentially, our position is that
24 if this defendant was mentally incompetent at the time of
25 the trial from the official records and from the testimony

1 of the two witnesses I intend to introduce at least it did
2 not appear to be so to the people handling this case at the
3 time.
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5 The defendant took the witness stand at the trial,
6 he participated in the trial, he in a sense threw himself
7 on the mercy of the Court, he was interviewed by a probation
8 officer, he seemed to understand what he has done, something
9 about the nature of his crime, and it is our position that
10 there was no apparent indication in 1960 that this defend-
11 ant was mentally incompetent.

12 THE COURT: Is it your position there has to have
13 been an apparent indication if in fact the Court finds that
14 the defendant actually was incompetent?

15 Let me put it another way around. Assuming he
16 were to be found actually to have been incompetent, but it
17 simply didn't appear because he was perhaps so incompetent he
18 didn't even advise his own lawyer; are you suggesting that
19 he is not entitled to a decision under those circumstances?

20 MR. HOFFMAN: No. I realize this does present a
21 problem for us.

22 THE COURT: Obviously it would fall outside the
23 realm of Robinson against Pate, but would require, I should
24 think, some consideration by this Court if that is the way
25 it develops.

2 Thank you, Mr. Hoffman.

3 Mr. Matz, please.

4 MR. MATZ: I would like at this time to introduce
5 certain essential exhibits and then we can proceed immediately
6 with the testimony of Mr. Washor, who has another court
7 engagement.

8 THE COURT: All right.

9 MR. MATZ: First, I would like to mark for identi-
10 fication the minutes of the trial that was conducted in 1960
11 for Victor Mayo in the County Court of Kings County.

xx 12 (Petitioner's Exhibit 1 marked for identifica-
13 tion.)

14 MR. HOFFMAN: I have no objection.

15 MR. MATZ: I offer it in evidence.

16 THE COURT: It will be received in evidence.)

xx 17 (Petitioner's Exhibit 1 received in evidence.)

18 MR. MATZ: The same would be done with Petition-
19 er's Exhibit 2, which is the transcript of the sentence con-
20 ducted in 1960.

21 MR. HOFFMAN: I have no objection to any of these
22 exhibits that counsel is offering.

xx 23 (Petitioner's Exhibit 2 received in evidence.)

24 MR. MATZ: Petitioner's Exhibit 3 is a transcript
25 of the proceedings in 1966 in which petitioner entered a

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plea of guilty in the New York County Supreme Court.

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THE COURT: I will be glad to see those, but what probative value do they have with regard to what happened in 1960?

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MR. MATZ: I anticipate the question of Mr. Mayo's possible waiver of his right to attack this proceeding will be raised, and what he was told and what he said in 1966 will be of relevance to that question. It is a peripheral issue to his question of competency.

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(Petitioner's Exhibit 3 received in evidence.)

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MR. MATZ: Petitioner's Exhibit 4 is a transcript of the sentence itself in 1966 that was imposed by Justice Schweitzer, ^d under which petitioner is now serving; that is, a transcript of the sentence.

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THE COURT: Received.

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(Petitioner's Exhibit 4 received in evidence.)

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MR. MATZ: Petitioner's Exhibit 5 is a copy of the sentence itself, the paper containing the actual term that was imposed in 1966.

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THE COURT: Received in evidence.

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(Petitioner's Exhibit 5 received in evidence.)

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MR. MATZ: Petitioner's Exhibit 6 is a copy of the minutes of the coram nobis hearing conducted in October 1967 before Justice Damiani of the Kings County Supreme Court.

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(Petitioner's Exhibit 6 received in evidence.)

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MR. MATZ: Petitioner's Exhibit 7 is a copy of the decision of Justice Damiani that was rendered after the hearing on the coram nobis application had been conducted.

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THE COURT: Received.

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(Petitioner's Exhibit 7 received in evidence.)

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MR. MATZ: For the sake of making the record in this case complete, I shall introduce as Petitioner's Exhibit No. 8 a copy of Justice Barshay's decision rendered in December of 1970, which reactivated the right of Mr. Mayo to appeal on the basis of not having known of his right to appeal back in 1960.

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THE COURT: Received.

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(Petitioner's Exhibit 8 received in evidence.)

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MR. MATZ: As Petitioner's Exhibit No. 9, I would like to introduce at this time a stipulation of facts which has been entered into between Mr. Hoffman and myself, a copy of which was sent to your Honor.

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THE COURT: Yes, I have read it already. So it better be introduced in evidence. It is received.

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(Petitioner's Exhibit 9 received in evidence.)

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MR. MATZ: At this time, your Honor, I would like to call to the stand Mr. Michael Washor.

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Washor-direct

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M I C H A E L W A S H O R, called as a witness
by petitioner, having been first duly sworn, testified
as follows:

DIRECT EXAMINATION BY

MR. MATZ:

Q What is your profession?

A I am an attorney licensed to practice in the State
of New York and various federal courts.

Q When were you admitted to the bar?

A I believe I was admitted December of 1959.

Q Did you represent Mr. Victor Mayo in a criminal
proceeding in Kings County Court in 1960?

A As a result of certain records that were shown
to me by yourself, I did in fact represent him.

THE COURT: You mean they refreshed your recollec-
tion you did?

THE WITNESS: Yes.

Looking at the gentleman I have no independent
recollection though his face does come back to me slightly,
but I believe the records indicate that I did.

Q You have no doubt that you did?

THE WITNESS: No doubt whatsoever.

Q Do you recall, MR. Washor, how you came to repre-
sent Mr. Mayo?

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Washor-direct

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A Again, I must answer as candidly as possible this was an assigned case.

THE COURT: I would assume so.

Q At that time were you engaged in private practice?

A Yes.

Q Had you been practicing law at that time for roughly four or five months?

A Somewhere in that time period, yes.

THE COURT: Had you done any criminal work before that case?

THE WITNESS: I would speculate that I had and if I must categorize my experience it was quite inexperienced.

THE COURT: Naturally, if you had only been out four months it wouldn't be very profound. You were doing some criminal law?

THE WITNESS: Yes.

Q You just stated, Mr. Washor, that you have no independent recollection of representing Mr. Mayo.

Can you remember or not the demeanor and attitude that he displayed toward you?

A Well, I had the benefit of looking at the sentencing minutes. I have had the benefit of communicating with yourself. I would suggest that my testimony as to those aspects, as to his demeanor, as to his approach, as to the nature of

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mdg Washor-direct 16
of our communications, I cannot with any degree of certainty say whether it is predicated on my original memory or as a result of some of the material and information conveyed to me, so I don't wish to mislead the Court or any of the attorneys questioning me.

THE COURT: In any event, what you are now about to tell me is what you believe, in good faith, was to have been your impression at the time, refreshed by the records that you have read and whatever material Mr. Matz brought to your attention?

THE WITNESS: Correct, your Honor.

THE COURT: All right.

✓ THE WITNESS: To the best of my recollection, qualified as I have attempted to do, there was an area of lack of complete communication. I was impressed with Mr. Mayo's, shall I suggest, quietness and our conversations were at a minimum.

THE COURT: Was there a co-defendant in this case?

THE WITNESS: Yes, I believe there was.

THE COURT: Did you represent those both?

THE WITNESS: No, I did not. The co-defendant was represented by another attorney. I do not know whether that other attorney was retained or assigned.

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Washor-direct

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Q Do you have any files that contain documents or other data concerning Mr. Mayo's mental condition in 1960?

A In 1971, approximately a ten-year period had elapsed and in accordance with the policies of our office we terminated keeping files ten years or older. I am only sorry that this matter had not come to light but just a handful of months prior to when it did, I would have had a file.

THE COURT: But you don't know whether the file included anything relating to his mental condition, do you?

THE WITNESS: I cannot answer that completely. The likelihood is that it did not because I did not broach the question of mental competency at the time of the representation.

Q Mr. Washor, I would like to direct your attention to Petitioner's Exhibit No. 2, transcript of the sentence of Mr. Victor Mayo in 1960, and in particular to page 4.

Would you please read this paragraph here?

A To myself, I assume?

Q Yes, to yourself.

THE COURT: It doesn't make much difference since there is no jury and it is in evidence.

The purpose, I take it, is to refresh your

1
2 recollection.

3 A I have read the paragraph.

4 Q If I may read it myself for the record, it states:
5 "I have spoken to the defendant on many occasions" --

6 THE COURT: Who are you quoting?

7 MR. MATZ: This is Mr. Washor speaking.

8 "The defendant is aware of the severity of the
9 crime and I ask your Honor to take into consideration his
10 background."

11 Q What did you mean by the statement that the de-
12 fendant is aware of the severity of the crime?

13 A Again, I have to ask the Court to bear with my
14 mental aberrations, whether it is filled in or the result
15 of information and lack of experience at the time that I ap-
16 peared on behalf of Mr. Mayo.

17 I assume and do recall that I did have discus-
18 sions with Mr. Mayo about disposing of the case by way of a
19 plea, a reduced plea to the indictment. I do remember com-
20 municating to Mr. Mayo that we had conferences with the
21 judge, I believe it was Justice Barshay at the time. And
22 so I am sure that I conveyed to Mr. Mayo, if not any more
23 at least the fact that the jail sentence and the time that
24 he would have to serve on the plea of guilty would be
25 determined by the Court.

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2 I do not believe at that juncture that I dis-
3 cussed the moral aspects of the acts themselves determining
4 or tending to determine whether or not he understood the
5 severity of the moral conduct as averse to the time that he
6 would spend in jail.

7 [Q] Fortunately, I take great pains at this stage of
8 my practice to do that with every individual defendant that
9 I represent. I do not believe that I had the sophistication
10 to do that at that time.

11 THE COURT: How old were you then, Mr. Washor?

12 THE WITNESS: I was 23 or 24 eleven or twelve years
13 ago.

14 If I may just bring something to the Court's at-
15 tention that may aid you in evaluating my reference to
16 that matter; during the course of my practice I have had
17 occasion to represent at least one individual where I prof-
18 fered a defense of insanity predicated on the background
19 almost identical to that of Mr. Mayo; that is, not guilty
20 by reason of insanity predicated on the defense of epilepsy
21 coupled with alcoholism where the charge was murder in the
22 first degree.

23 I wish I had the ability and sophistication to
24 dig in, if I can use the colloquial language, to properly
25 set up the possibility of a defense I do not believe I did.

1 But I have done this on occasion during my practice so I must as a witness apologize.

2 THE COURT: I take it you are trying to tell me --
3 never mind the apologies, it is for me to find out whether
4 you are to apologize in any way but I take it what you are
5 trying to tell me is that during the course of your practice
6 you have recognized the propriety of entering such a
7 plea when the evidence justified it, and if you had been
8 more experienced at the time and had known more about the
9 facts of this defendant you would presumably have made such
10 a plea then, is that what you are saying?

11 THE WITNESS: Well, I would have explored the
12 basis of making such a plea.

13 THE COURT: There is a good deal of difference
14 in entering such a plea with regard to murder and a charge
15 of stealing cigarettes from a candy store.

16 THE WITNESS: Granted, but had I had the information I would have explored it.

17 THE COURT: Go ahead.

18 Q To return to the statement concerning the defendant's awareness of the severity of the crime, did you mean
19 by that the length of the sentence that could possibly be
20 imposed?

21 A I would say as candidly as I can that that is

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mdg Washor-direct

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probably what it was restricted to.

THE COURT: As candidly as I can, I would say almost every lawyer facing a sentencing judge says his client understands the severity of the crime.

THE WITNESS: An error I would suggest that is not made by me any longer.

Q Based on your recollection of your general policies and practices at that time -- that is, in 1960 -- and on your review of the transcripts of the trial and the sentence, can you state how many times you saw Mr. Mayo back in 1960?

A I would have to say anywhere from three, four or five or six times at its most.

Q Do you recall where you saw him?

A I have seen-- I do not have an independent recollection.

Q I understand, but where would you have seen him?

A I would have seen Mr. Mayo in one of two places, in the jail itself where he was being lodged pending the trial --

THE COURT: He was in jail pending trial?

THE WITNESS: I do believe that.

MR. MATZ: Yes, he was.

THE COURT: Do you remember what jail?

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Washor - direct

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THE WITNESS: If I remember correctly, it would have been the then Atlantic Avenue House of Rehabilitation around the corner from the court.

MR.MATZ: We have stipulated that it was in the Kings County House of Detention, and it was about a five and a half month period.

THE WITNESS: In addition to which, your Honor, I probably would have seen him in what they call quote "the bull pen" end quote in the courthouse where the prisoners would be lodged waiting to be called to court in their respective turn.

Q Can you describe what the conditions are like in the bull pen?

A What they were like-

Q Yes, what they were like.

A They were crowded, there was no privacy, although I believe booths were segregated or separated for individual conferences. I don't believe that there was an opportunity to confer in the comfort and ease that I believe a conference of such important nature could occur, but I believe that's the conditions that exist in all the jails even to this day.

Q Were the conditions conducive to finding out intricate or complicated details about a client's background?

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Washor - direct

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A I would answer in the negative. I would suggest, of course, it would depend on the individual lawyer also.

Q Do you recall for how many minutes you would have spoken to Mr. Mayo on the three or four or perhaps more occasions?

A I couldn't give you a time period. It wouldn't have been very long.

THE COURT: Does not very long mean perhaps no longer than ten or fifteen minutes each time?

THE WITNESS: I think that would be fair and reasonable. Again, I have no independent recollection. I am trying to establish that which I had done ten years ago.

Q Mr. Washor, prior to the date of the trial, did Mr. Mayo or anyone else ever tell you, or did you learn from any source that he had attempted to commit suicide in the past?

A No, I had no knowledge of that at all.

Q Did Mr. Mayo or anyone else ever tell you or did you learn from any other source that he had been diagnosed as possibly having suffered from epilepsy?

A I do not believe I had any independent knowledge of that fact.

Q Did you have any independent knowledge of the fact that he had been diagnosed as possibly having suffered

1 from chronic brain syndrome?

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3 A Not specifically. There was some information
4 conveyed to me, and I believe it was by Mr. Mayo's mother,
5 on the date of the sentence, as my memory was refreshed from
6 the reading of the sentence minutes that at least he had
7 some sort of confinement to a hospital in the past. But be-
8 yond that no specific information was conveyed to me.

9 Q I would like to direct your attention again to
10 Petitioner's Exhibit No. 2, which is the minutes of the
11 sentence transcript, and ask you to read to yourself this
12 paragraph right here.

13 A I have read that.

14 Q That paragraph states "I would like to bring to
15 your attention the fact that he had from 1952 to 1957, the
16 defendant was in Rockland State Hospital. He was placed
17 there by his family."

18 Is this the knowledge to which were just refer-
19 ring that you think you learned from Mrs. Mayo, that is, his
20 mother?

21 A I believe that it is, yes.

22 MR. MATZ: For the record I would like to state
23 the actual period of time Mr. Mayo was in Rockland State
24 Hospital was from 1953 to 1958.

25 THE COURT: What was the statement made in the

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Washor- direct

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transcript?

MR. MATZ: 1952 to 1957.

Q Prior to the date of the trial did you learn from any source, Mr. Mayo or anyone else, that he had been declared mentally ill?

A No, I had not.

Q You learned at the day of sentencing that he had been at the Rockland State Hospital?

A That would come either from the family, the mother if I remember correctly, or during the course of the pre-sentence negotiations - at that time judges were more inclined to reveal some of the aspects of a probation report so that the source of that statement or information could be from the mother or possibly relayed to me by the Court. I do not independently recollect which.

Q Did you know at any point prior to the sentencing from any source that Mr. Mayo had been a mental patient at the Kings Park Hospital as well?

A I had no knowledge of that.

Q Did you have any knowledge of the fact that about nine or ten days before the date of the crimes-- that is the date the crimes were committed -- Mr. Mayo had attended the Brooklyn Aftercare Clinic as an outpatient receiving psychiatric treatment?

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Washor - direct

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A No independent knowledge of that.

Q Mr. Washor, if you had known that Mr. Mayo had a practically uninterrupted history of institutionalization and a lengthy history of mental illness, that there were medical reports indicating he had suffered from epilepsy and congenital brain disease or brain damage, what would you have done?

I think you mentioned that previously in your testimony.

Could you elaborate?

A I can tell you what I think I would do today, bearing some experience and knowledge.

THE COURT: I can tell you what you are going to tell me.

A I do not believe that I would have handled it properly at that time. I had not the sufficient experience to handle it. I suggest that the proper thing for me to have done at the juncture would have been to have communicated that fact to the Court, having been assigned to represent the individual, and requesting that he be submitted initially for a psychiatric examination so that we could determine in the first instance whether or not he was competent to stand trial absent exploring the aspects of any defense that might be brought to light by the examination.

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Washor-direct/cross

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That would have been and should be the proper procedure, I believe.

MR. MATZ: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. HOFFMAN:

Q Mr. Washor, were you practicing law with anyone else in 1960?

A Yes, I was.

Q Who was that person?

A That was my father, an attorney who at that time had a good deal of experience.

Q Did you discuss your cases with your father?

A I think that it would be fair to say that I did.

Q Do you have any recollection of whether you discussed this case with your father?

A No, I do not have an independent recollection but I think it would be fair to say that at that juncture, as I do today, I would have discussed every aspect of the case.

Q Do you recollect in this case whether the defendant took the witness stand?

A Well, not independently, but from the negotiations that occurred by and between counsel and the Court, and the

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Wshor-cross

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fact that it was a plea --

THE COURT: In that case?

THE WITNESS: In that case. It would be my reasonable assumption that he did not testify.

THE COURT: Did not?

THE WITNESS: Did not testify. I do not have any independent recollection.

Q Would you direct your attention to page 57 of the trial transcript and just go through that for a moment.

THE COURT: Is this the transcript of the 1960 trial?

THE WITNESS: Yes. I might indicate it shows Mr. Mayo did testify.

THE COURT: Substantively in regard to the offense itself?

THE WITNESS: I haven't read it. I don't know the answer.

THE COURT: I assume counsel can agree. Is this transcript in evidence?

MR. HOFFMAN: Yes. This is Exhibit 1, your Honor.

THE WITNESS: Just this one page?

MR. HOFFMAN: No, it goes for a number of pages. I am showing you this for the purpose of refreshing your

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1
2 recollection.

3 A My recollection is obviously incorrect. The
4 transcript is sufficient to my mind that he did testify.

5 Q Would you have discussed with this defendant the
6 decision to take the witness stand?

7 A Under normal conditions the answer would be yes.
8 However, as I indicated to Mr. Matz when I was interviewed
9 by him, your Honor, that prior to the trial itself a plea
10 was offered by the prosecution and negotiations were had
11 by and between the defense counsel and the Court, and if
12 I am correct in my recollection Mr. Mayo had from the in-
13 ception, to use a colloquial, thrown the towel in, was
14 willing to take a plea, and it was the co-defendant that
15 did not wish to go through a plea.

16 THE COURT: How does that relate to the question
17 of whether you would have conferred with him?

18 A Because I believe the Court had indicated, and
19 I say this with all ^{candor} [candor], that we would be forced to
20 proceed with the trial because the district attorney of
21 Kings County at the time would not grant a severance and
22 allow a plea as to one defendant and try the other defend-
23 ant, and that I was not even a bit apprehensive as to the
24 finding of the Court because Justice Barshay had indicated,
25 and I suggest again off the record, that we had no great

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mdg Washor-cross 30
concern here so long as the defendant was not fooling with
the Court, was not taking advantage of the Court, was de-
ireus of interposing a plea, amenable both to himself and
the prosecution, that my discussions with Mr. Mayo would
have been not in the area of the constitutional issue but
more in the area that when you do testify, make sure you
tell the truth. That would have been limited to that as-
pect.

Q Mr. Washor, I direct your attention to page 3
of the sentencing minutes, and this sentence at the bottom
of the page "The defendant hopes and does have an opportunity
to have the same job that he had prior to being apprehended."

Do you recall where you got this information
from?

A Again, I think that that would come from one of
three sources; either the defendant himself -- I did inter-
view him -- and I am sure that even at that stage of, shall
I suggest my naiveness, I was concerned with a work record;
or his mother; or a revelation on the part of the probation
report by the Court to me. I do not know which of the
three sources it would come from.

MR. HOFFMAN: No further questions.

THE COURT: Thank you very much, Mr. Washor.

Do you have any further questions of Mr. Washor?

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Mayo-direct

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MR. MATZ: No further questions.

(Witness excused.)

MR. MATZ: At this time, your Honor, I would like to call to the stand Mr. Victor Mayo.

..

V I C T O R M A Y O, called as a witness by
the petitioner, having been first duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION

BY MR. MATZ:

Q Mr. Mayo, are you the person who brought this proceeding?

A Yes, I am.

Q Mr. Mayo, this is a large courtroom and your voice may not travel loudly enough for me to hear you, so please answer my questions a little bit more loudly, if you can. If you have any trouble understanding them, just tell me and I will try to restate them.

Now, I would like to show you Petitioner's Exhibit No. 9, which is a stipulation of facts or an agreement that Mr. Hoffman and I entered into about various facts of your life.

Have you discussed this document with me before?

A Yes, I have.

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Mayo-direct

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Q I will just leave it here for the time being.
When did we discuss that, that stipulation, that document?

A Last week.

Q And where was that?

A In the Federal House of Detention.

Q I would like to ask you a few questions about your life and about certain events that are set forth in this stipulation prior to the date of the trial that took place in 1960.

First, I would like to direct your attention to item 22 on page 8 of the stipulation. Since I would read it aloud for the record anyhow, I will read it now.

It says: "On July 19, 1955, Dr. Wiggers of the Rockland State Hospital, reported on a document entitled 'Request for Consultation' concerning Victor Mayo. Yesterday, Dr. ^{August} [August] removed two pieces of glass from this boy's mouth."

Mr. Mayo, do you recall the removal of that particular piece of glass at that time?

A No, I don't.

Q Can you explain how glass came to be in your mouth?

A I used to take it every time I got mad.

THE COURT: You used to do that?

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Mayo - direct

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THE WITNESS: Every time I got mad and wanted to die.

THE COURT: What did you do?

THE WITNESS: Swallow glass.

THE COURT: Have you done it more than once?

THE WITNESS: Yes, but I didn't know they knew about it.

Q You didn't know that the doctor knew about it?

A No.

THE COURT: When did you find out, just when Mr. Matz told you about it?

THE WITNESS: Yes, when he told me.

Q Was taking glass the only effort you made or the only attempt you made to commit suicide?

A No.

Q Have you tried another way?

A When I didn't have glass.

Q When you didn't have glass, what did you try to do when you didn't have glass?

A I used to bang my head against the wall.

Q And where did that take place? When did you try to do that?

A In Rockland State Hospital.

Q Mr. Mayo, I would like to direct your attention

1 to item 12 on this stipulation. It is on page 4. It con-
2 cerns your trial in 1960 when you were before Justice
3 Barshay in the County Court of Kings County.
4

5 I don't think it is necessary to read exactly
6 what it says, but I want you to think back to that day and
7 to the months immediately preceding it. Try to remember
8 as best you can the information I am going to ask.

9 THE COURT: Do you remember when you were tried
10 before Justice Barshay for the robbery of the store?

11 THE WITNESS: Yes, your Honor.

12 THE COURT: How old were you then, do you remember?

13 THE WITNESS: About 16.

14 THE COURT: I know that is not quite accurate,
15 but I am trying to see his degree of recollection regarding
16 the occasion.

17 Was there someone else with you who robbed the
18 store?

19 THE WITNESS: Yes, there was.

20 THE COURT: Do you remember his name?

21 THE WITNESS: Manny Campbell.

22 THE COURT: Okay. I just wanted to ask those
23 couple of questions.

24 Go ahead.

25 Q Have you read the transcript of your trial in

1960?

A Yes, I have.

Q Before the day of the trial did anyone ever tell you what the purpose of a criminal trial is?

A I don't remember anybody.

Q Did you know ^{from} [for] your own knowledge or independently what the purpose of a criminal trial is?

A No, sir.

Q Before that trial in 1960 took place you didn't know?

A No.

Q Did you think you knew what the purpose was? Did you have any idea of what was supposed to happen?

A I was just supposed to go out there and tell the story about the crime.

Q You were supposed to go out and tell the story?

A Yes.

Q Did you understand, Mr. Mayo, that a criminal trial was not supposed to be held if the defendant, if you in your case, did not truly understand what it is all about?

A No, sir.

Q In 1960 did you understand that a criminal trial was not supposed to lead to the punishment of someone who was not legally responsible for the acts he was accused of

1
2 committing?

3 A No, sir.

4 Q I would like to direct your attention to items
5 2 through 10 of this stipulation.

6 I don't think it is necessary for you to review
7 each of them, but I think I can state accurately that they
8 summarize various facts about your life, and in particular
9 they set forth information concerning a prior history of
10 institutionalization and mental illness; that is, they say
11 that you were confined in various places prior to the age
12 of 16.

13 Now, when you were ready to go to trial in 1960,
14 did you understand that if you told your lawyer Mr. Washor
15 about all of these prior experiences and in particular your
16 history of being confined in institutions and suffering from
17 mental illness, that if you had told him that information,
18 you could help him decide how to prepare for your trial?

19 A No, sir.

20 Q Did you understand that if you told the lawyer
21 about this information it could help him state reasons to
22 the judge why you should not be convicted and treated as a
23 criminal?

24 A No, sir.

25 Q Did you realize and understand in 1960 that if

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you told the judge about this information it could help him decide what to do with you or where to send you after the trial was over?

A No, sir.

Q Now, did you hear me ask Mr. Washor certain questions right here in this courtroom this morning?

A Yes, I did.

Q Did you hear his answers?

A Yes.

Q Did you hear me ask him whether he had known about your being in several, five in fact, institutions before you were the age of eleven?

A Yes, I did.

Q And you heard him answer that he didn't know about it?

A Yes.

Q Did you tell him about that?

A No, sir.

Q And you did not tell him that up until the age of eleven practically your entire life had been spent in these institutions?

A No, sir.

Q Did you tell Mr. Washor about your experiences and many years in two state mental hospitals?

1
2 A No, sir.

3 Q Did you tell him that you had been assigned to
4 attend the Brooklyn Aftercare Clinic for outpatient psychi-
5 atric treatment?

6 A No, sir.

7 MR. MATZ: I have no further questions.

8 CROSS-EXAMINATION

9 BY MR. HOFFMAN:

10 Q Mr. Mayo, do you remember testifying at your
11 trial?

12 A Yes, I do.

13 Q Do you remember taking the witness stand?

14 A Yes.

15 Q And explaining your story to the judge?

16 A Yes.

17 Q Do you remember whether you discussed this with
18 your lawyer or not?

19 THE COURT: Before he testified?

20 Q Before you testified.

21 THE COURT: Did you talk to your lawyer about
22 what you would be saying when you got on the stand?

23 THE WITNESS: Yes, sir.

24 Q Do you remember how many conversations you had
25 with your lawyer either at the time of the trial or before

1 the trial, how many times you saw your lawyer?

2 A I only remember seeing him in the bull pen before
3 I went into court.

4 Q Did you see him at any other time?

5 A No, sir.

6 THE COURT: Did you see him only once then or more
7 than once in the bull pen, if you can remember?

8 THE WITNESS: That is the only time I remember
9 seeing him.

10 THE COURT: You think it was only once?

11 THE WITNESS: I think so. I am not sure.

12 THE COURT: You are not sure?

13 THE WITNESS: No.

14 THE COURT: But it was only in the bull pen you
15 saw him?

16 THE WITNESS: Yes.

17 Q Did you have a conversation with your lawyer at
18 that time? Did you talk to him?

19 A Yes, sir.

20 Q Did you tell your lawyer that you did not under-
21 stand what was happening to you?

22 A I don't know. I don't know, sir.

23 Q Do you remember talking to a probation officer
24 after the trial?
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A No, sir.

Q Did you understand when you were at the trial that you might go to jail?

A Yes, sir.

Q Did you understand that you had committed a crime?

MR. MATZ: I object to that, your Honor.

If you want to rephrase it that he had been accused of committing a crime I have no objection.

THE COURT: They are two different questions.

I will allow Mr. Hoffman to ask the question.

Did you understand you had committed a crime or not that you had committed a crime?

THE WITNESS: I thought I had committed a crime.

THE COURT: What did you think the crime was?

THE WITNESS: I was told that it was a robbery.

Q And do you remember telling the judge in court about the robbery?

A Yes, sir.

MR. HOFFMAN: No further questions.

THE COURT: Mr. Mayo, what do you do now up at Clinton? Do you have a job of any kind up there, any kind of work?

THE WITNESS: Yes.

THE COURT: What is that?

2 THE WITNESS: They call it mess hall captain.

3 THE COURT: Mess hall captain?

4 THE WITNESS: Yes.

5 THE COURT: Do you wait on tables, is that what
6 you do?

7 THE WITNESS: Yes.

8 THE COURT: Is that your regular job or is that a
9 rotating job?

10 THE WITNESS: It is my regular job, sir.

11 THE COURT: Have you done any other kind of jobs
12 up there?

13 THE WITNESS: No.

14 THE COURT: Do they have a library there?

15 THE WITNESS: Yes, they do.

16 THE COURT: Do you ever borrow any books from it?

17 THE WITNESS: Yes.

18 THE COURT: What kind of books do you read?

19 THE WITNESS: Books on Greek mythology.

20 THE COURT: How did you get interested in that?

21 THE WITNESS: I just liked--

22 THE COURT: I am interested in it myself. That is
23 why I ask.

24 THE WITNESS: I like the mythical tales.

25 THE COURT: What about classes, do they have any

1
2 classes up there?

3 THE WITNESS: Yes, they do.

4 THE COURT: Do you take any classes?

5 THE WITNESS: No.

6 THE COURT: Whatabout TV, do they have TV?

7 THE WITNESS: Yes, they have it in the yard.

8 THE COURT: Do you watch it much?

9 THE WITNESS: No.

10 THE COURT: What about sports, do they have any
11 sports?

12 THE WITNESS: Yes.

13 THE COURT: Do you take part in any sports?

14 THE WITNESS: No, your Honor.

15 THE COURT: Any questions you want to ask me?

16 THE WITNESS: No.

17 THE COURT: All right.

18 MR. MATZ: I just have one more question.

19 REDIRECT EXAMINATION

20 BY MR. MATZ:

21 Q Mr. Mayo, when you say you remember testifying
22 before Justice Barshay in 1960, do you mean you remember
23 everything that was asked you and everything that was said
24 or just that you remember being up there on the witness
25 stand?

2 A I remember being on the witness stand.

3 MR. MATZ: That's all.

4 Thank you.

5 I have no further questions, your Honor.

6 THE COURT: Thank you, Mr. Mayo.

7 (Witness excused.)

8 MR. MATZ: Your Honor, petitioner has one more
9 witness scheduled, his name is Dr. Richard Sallick. He
10 is a very busy psychiatrist. He assured me he would be
11 here at ^{11:15} [1:15]. It was difficult for me to predict how long
12 the examination would take.

13 THE COURT: Let's take a brief recess.

14 (Recess.)

15 MR. MATZ: At this time, your Honor, I would like
16 to call Richard Sallick.

17

18 R I C H A R D S A L L I C K, called as a witness
19 by the petitioner, having been first duly sworn, tes-
20 tified as follows:

21 DIRECT EXAMINATION

22 BY MR. MATZ:

23 Q Dr. Sallick, what is your profession?

24 A I am a physician, psychiatrist.

25 Q Are you duly licensed and practicing under New

1
2 York State law?

3 A Yes, I am.

4 Q You stated that your specialty is psychiatry?

5 A Yes.

6 Q Are you a Diplomate?

7 A Yes, of the Board of Psychiatry and Neurology.

8 Q Could you state your college and medical school
9 to which you went?

10 A I went to Harvard College and graduated in 1958,
11 and Cornell Medical School and graduated in 1962.

12 Q How long have you been licensed?

13 A Since 19 -- I am not sure if it is 1962 or 1963.
14 1963 in New York, I believe.

15 Q For how long have you been a specialist, Dr.
16 Sallick?

17 A I finished my psychiatric residency six years
18 ago.

19 THE COURT: Let me say Dr. Sallick has testified
20 before me and I have a high regard for his qualifications.

21 If you want to put something in the record for the
22 purpose of the record, it is all right.

23 MR. MATZ: I appreciate your saying it.

24 Q May I have your present position?

25 A Director of the outpatient clinic at the New York

Hospital.

Q Have you held previous positions in connection with the practice of psychiatry?

A Yes. I was at the National Institute of Mental Health for two years.

Q Before you on the witness stand is Petitioner's Exhibit 9, which is a stipulation that was entered into between Mr. Hoffman and myself.

Have you read and discussed this document and the information it contains with me?

A Yes, I have.

Q Are you familiar as a result of the reading that document with the institutional and medical history of Victor Mayo through January of 1961?

A Yes.

Q Insofar as it is reflected in that document?

A Yes, I believe so.

Q I would like to ask you certain questions on certain information set forth in Petitioner's Exhibit 9, the stipulation, and in particular I would like to direct your attention to Exhibit A to the stipulation, which is a doctor's report dated May 8, 1951. The doctor who compiled this report is named Doody.

Dr. Sallick, the report refers to the Wechsler

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intelligence scale. Is that scale the most commonly used measure of intelligence?

A It is.

Q According to this report, roughly in the middle of the first page, at the time that an IQ test was taken in 1951, Mr. Mayo's intelligence quotient was 80, and again the report states this places him in the range of "dull normal."

Dr. Sallick, is it correct that the classification of dull normal is given to persons whose IQ range is approximately 70 to 85?

A That's right.

MR. MATZ: I would like to mark for identification a copy of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. I will mark a copy which was printed in 1964, although the original publishing date was 1952.

xx

(Petitioner's Exhibit 10 marked for identification.)

Q Dr. Sallick, let me show this exhibit to you. Is that manual known as the DSM by psychiatrists?

A By psychiatrists, right.

Q Is the DSM the recognized and authoritative manual on which psychiatrists rely in making diagnoses?

1
2 A Yes.

3 Q When psychiatrists employ special terms having
4 certain meaning or information in their reports or diag-
5 noses, is it generally understood in the profession the
6 meaning corresponds to the definition set forth in that
7 manual?

8 A Yes, that is accepted.

9 Q Are mental scores and scores on psychological
10 tests such as IQ examples also classified according to the
11 DSM?

12 A Yes, they are.

13 Q To return to Exhibit A, is it correct that per-
14 sons with an IQ range of 70 to 85, that is, those placed
15 within the dull normal range, is it true those persons are
16 defined by the DSM as having a mental deficiency?

17 A That is correct.

18 THE COURT:

19 Q Could you elucidate a little on that and tell me
20 what the manual means or what you understand it to mean by
21 use of the term mental deficiency?

22 A It would be based upon some one of the IQ tests,
23 most frequently the Wechsler. It would be based upon in-
24 herent ability, theoretically, rather than upon acquired
25 knowledge, although obviously acquired knowledge has got
some effect on it. The ranges are cut off 85 to 105 --

1 that is sort of normal or average range that is acceptable
2 as normal. 70 to 85 is termed mild impairment and these
3 people are considered educable to support themselves, care
4 for themselves, but definitely limited. Below that would
5 be the next category.

6 MR. MATZ:

7 Q Doctor, you have read Exhibit A before, is that
8 correct?

9 A Yes, I have.

10 Q Can you derive a general impression as to Mr.
11 Mayo's general condition at the time this report was com-
12 piled based on its contents?

13 A He is described as being extremely tense at the
14 time, suffering from facial tic, and being hard to communi-
15 ate with in that sense. He was, however, reachable ac-
16 cording to Dr. ^{Doody} [Goody] with some effort. Nonetheless he
17 described him as withdrawn, isolated, and he strongly
18 recommended some form of individual therapy that would
19 hopefully serve to help him develop his personality poten-
20 tial further .

21 The best sentence describing that is this one:
22 "He needs emancipation from his seclusive attitude and
23 play therapy could be used to draw him out. He has a
24 tendency to slip into a world of his own, and he will need
25 consistent, persistent handling to help him to adjust."

2 I think Dr. Doody felt quite clearly that he was
3 disturbed at the time and there was grave concern he would
4 ^{develop}
[evelop] a progressive and more marked mental illness.

5 Q I would like to direct your attention now, Dr.
6 Sallick, to items 15 and 16 of the stipulation proper, the
7 text that was agreed upon by counsel in this proceeding.
8 That appears on the bottom of page 4 and page 5.

9 Could you review those briefly, please?

10 A Yes. These are immediately before Dr. Doody saw
11 him, I believe, at first.

12 Q 15 and 16 --

13 A Are both subsequent.

14 Q Are both subsequent, correct?

15 A Right.

16 Well, this, I believe, elaborates upon Dr. Doody's--

17 Q My question to you is whether the descriptions in
18 these two items, 15 and 16, are consistent with the descrip-
19 tion or the picture of Mr. Mayo's mental condition that was
20 previously set forth in Exhibit A which we discussed before.

21 A Yes, I think they are entirely consistent.

22 Should I --

23 Q Yes, if you can elaborate specifically in what
24 ways, what highlights of Mr. Mayo's condition seem to mani-
25 fect themselves again.

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A To begin with, there was an emphasis on his tendency to be withdrawn, and behind his withdrawal to seem fearful and apprehensive. And along with this was the difficulty in communicating with him and his tendency not to assert himself at all. They point out the nervous mannerisms, and speak also of what they call the flatness in his emotional response.

Q I would like to ask you about that, Doctor. At the end of item 16, and this appears on page 6 of the stipulation, there appears this quote from one of the reports in 1952. I will read it in its entirety:

"Nervous mannerisms still remain; eye blinking is quite noticeable and the boy seems tense. Emotionally, there seems to be a flatness in his response."

My question to you is whether the term "flatness" has a recognized psychiatric meaning.

A Yes, it is an accepted and frequently used psychiatric term.

Q What is its meaning?

A It is used to describe a state in which one gets very little sense of what emotion is going on in another person. Generally speaking, when you talk with someone you receive from them certain responses that give you an understanding of what emotions are going on in them, whether

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2 it be anger or friendliness. Flatness is used really to
3 describe a kind of withdrawal that is not --

4 THE COURT: Kind of neutral, neutrality?

5 THE WITNESS: Yes.

6 Q Is it a term that is commonly characteristic of
7 people who have retreated from contact?

8 A Yes, it is the hallmark of that.

9 Q I would like to direct you to Exhibit B of
10 the stipulation --

11 THE COURT: May I ask a question at this time?

12 In Exhibit A, there is discussion with regard to
13 the IQ and, as you pointed out, the designation of that
14 IQ level as dull normal, and so forth.

15 There is also a description of the emotional dif-
16 ficulties, and there is a stress on the personal history
17 of Mr. Mayo, understandably. The particular reference I
18 have in mind begins "He is a victim of a disorganized home
19 situation", etc.

20 My question is whether that kind of background
21 could be expected to affect mental function as well as
22 emotional behavior, or whether it is fortuitous in a case
23 like this that we find somebody who has a limited intelli-
24 gence as well as emotional disorder.

25 THE WITNESS: I think that is still not entirely

1 resolved. It has certainly been shown that putting a young
2 child in an enriched environment can raise their functioning
3 on IQ tests, and prior to the age of six, IQ tests are not
4 considered very valid. By the time you do get up to ten
5 or so --
6

7 THE COURT: He was nine or ten?

8 THE WITNESS: Yes. There is an increased validity
9 to them. And so there is an overall validity to it, even
10 though in all likelihood in a person like this you get a
11 kind of scattering, you might get a better kind of response
12 in certain areas. In other words, he might be good at
13 picture assembly while he might be poor at verbal.

14 THE COURT: What I am trying to ascertain if it is
15 possible to answer this is whether we are dealing with some-
16 body who suffered from two conditions going back basically
17 to one cause or two conditions going back to two causes.
18 I don't know whether it is possible for you to answer that in
19 any event, particularly on the basis of the documents.

20 Do you have any reaction to it?

21 THE WITNESS: I tend to be somewhat environmentally
22 prejudiced but I don't think anybody could make a clear
23 case here whether there were two or one etiology.

24 THE COURT: Thank you.

25 MR. MATZ: May I proceed, your Honor?

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THE COURT: Yes, please.

Q I direct your attention, please to Exhibit B, Dr. Sallick, which is a report compiled by Dr. Piana on March 15, 1953, at the Astor Home for Children.

May I ask you to keep in mind at this stage, also, Exhibit C, which is a diagnostic synthesis or summary of the information set forth in Exhibit B.

In your analysis of Victor Mayo's psychiatric and mental condition as set forth in this document you have read, is this report and diagnosis of any special significance?

A It seemed to me this was the fullest report that we had of the exhibits that I saw on Mr. Mayo. Insofar as it described a -- it was a synthesis of ten to twelve interviews with him rather than simply a diagnostic interview. For that reason I think it is more likely -- it is likely to have a greater validity. It is evidently more thorough, even in terms of the history it gives.

Q Are there indications in this report that the conditions from which Victor Mayo had previously suffered, according to the items we discussed thus far, that those conditions still persisted at the time this report was compiled?

A Yes. This again would be entirely consistent

1 with the earlier report from Dr. Piana, and from Dr. Doody,
2 and it would be my impression that what they really are
3 describing is a moderate degree of progression, really of
4 deterioration, and the symptoms, if anything, are somewhat
5 more marked.
6

7 THE COURT: The condition rather than the patient
8 had progressed, is that right?

9 THE WITNESS: Right, unfortunately.

10 Q Are there any particular passages that you ^{think} [think]
11 of when you point out the possible deterioration of the
12 condition.

13 A Well, for one thing we have a pretty full de-
14 scription of his day-to-day behavior. I think at Rhinebeck
15 where he was at that point with regard to the obvious be-
16 havior problems, breaking windows, numerous other things
17 which they detail.

18 Secondly, it also goes in somewhat, aside from
19 the destructive acts, to the difficulty he had in terms
20 or organizing himself to complete any task, a short atten-
21 tion span, his rather aimless behavior, and his inability
22 to kind of plan an act independently at all.

23 And then it describes in greater detail his in-
24 ability to form any kind of relationship with people or
25 even objects, his general state of indifference which

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exists, his lack of interest in work or play, as they describe it.

Then I think the last paragraph kind of summarizes what Dr. Piana thought the condition was at the time.

Q The last paragraph of the exhibit?

A Yes. It noted that there was no overt psychosis as manifest by delusional material or by hallucinations. But he still spoke of him as having what Dr. Piana felt was a permanent form of ego rupture, which apparently he felt was made manifest during periods of irrational, excited and incoherent behavior.

Q May I interrupt at this point to ask you certain questions concerning the function of the ego and Mr. Mayo's condition insofar as it affected his ego at that time.

Before I do I want to call your attention to the middle paragraph of page 3. For the sake of lucidity I should point out there are two pages 3 to this document, but I am speaking of the first one.

In the middle it says, and I am quoting out of context, but it does say: "He is an extremely immature child with no evidence of any superego strength. There is no ^{ego} [ego]-integration and no self-control whatever."

The last sentence of the same page states: "We feel that Victor is affected by and has a tendency to a

1 permanent form of ego-rupture characterized by episodes of
2 aggravation during which he becomes panicky, wildly excited,
3 incoherent, and perhaps suicidal(though he has never at-
4 tempted suicide.)"

5
6 Dr. Sallick, can you define or describe in lay-
7 man's terms, if possible, the meaning and importance of the
8 ego and superego?

9 A These are all, of course, just theoretical con-
10 cepts, but the id, ego, and superego were theories formulated
11 by Freud to help develop and help people have a framework
12 upon which to understand personality development. In this,
13 the ego was spoken of as that function of the personality
14 which enables people to relate to their environment, a kind
15 of a mediating factor between their emotional drives and
16 their conscience.

17 Q Emotional drives are represented by the concept
18 of the id, is that correct?

19 A Yes.

20 Q And the repressive or conscience-stricken by the
21 superego?

22 A Yes.

23 Q And it is the ego in this conceptual trilogy that
24 resolves the conflict between the other two forces, is that
25 correct?

2 A Yes.

3 Q In terms of a person's ability to relate to others
4 and deal with things in a way that can assist him in pro-
5 moting his own interests or help him look out for himself
6 when he needs to, does the ego play any special role?

7 A That's really the ego's function, and I might
8 add here that while again these become-- this kind of
9 division of the personality is just a theoretical one, it
10 is the concept of the ego which has-- which would be lacking
11 in a person with a psychotic type of illness.

12 Q Doctor, what does the term "ruptured ego" mean?

13 A Really just broken or undeveloped. When you try
14 to diagnose a child you are dealing with a fluid developing
15 kind of entity, and therefore it is sometimes harder to make
16 clear diagnoses in children because you hope for additional
17 development.

18 What Dr. Piana was saying at this time was that he
19 felt the possibility of developing a well-functioning ego
20 that would help this person to relate well to others and to
21 society, he is saying that at this point he felt that it
22 was permanently broken and not really developable in a good
23 way.

24 Q If a person suffers from a broken ego or even a
25 faulty ego in terms of this concept, can he proceed as would

1 a normal person to assist himself or promote his own inter-
2 ests, especially in times of difficulty?

3 A Certainly not consistently. In other words,
4 at times he might, but this would be a real lack.

5 Q Doctor, on the bottom of page 2 and the top of
6 page 3 of this report there appears a description of an
7 incident which the person who compiled the report says, or
8 refers to as "what would appear to be an epileptic fit."

9 Do you agree the description of what happened to
10 Victor Mayo at the time is a description that could provide
11 an adequate medical diagnosis for the conclusion he had suf-
12 fered an epileptic fit?

13 A It would certainly be adequate to conclude that
14 he had suffered a convulsive seizure. Whether epilepsy,
15 per se, was the cause of it or something else would be hard
16 to say but he certainly had a convulsive seizure.

17 Q Is one of the medically recognized causes of
18 convulsive seizures something known as organic lesion, a
19 term, incidentally, which the report itself refers to?

20 A Yes, particularly in a child you would be con-
21 cerned there was an organic lesion which caused this.

22 Q What is a lesion?

23 A A lesion here means some demonstrable structural
24 or chemical abnormality.
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Q In layman's terms is it the same thing pretty much as brain damage?

A Yes.

The presence of it would validate brain damage.

THE COURT: Organic is not suffered through an injury?

THE WITNESS: It means not functional, not suffered through emotional but actually there in the physical structure.

THE COURT: It could have been caused by an outside injury?

THE WITNESS: By a blow or something of this sort, yes.

Q Is the condition of epilepsy associated medically with intellectual deterioration and impairment of judgment in many cases?

A Certainly there were old concepts that epilepsy was associated with permanent deterioration. I don't think it is necessarily so myself.

THE COURT: I suppose if you are recovering from an illness severe enough it could damage the personality for emotional reasons rather than physical reasons?

THE WITNESS: Yes, because it is pretty hard to live under that sort of condition.

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Q Dr. Sallick, Exhibits B and C conclude with the diagnosis, and the diagnosis given is "childhood schizophrenia, hebephrenic tendencies."

Could you define the meaning of hebephrenic schizophrenia, and I think perhaps to start, can you state in general what schizophrenia is and then clarify it by defining hebephrenic schizophrenia?

A Schizophrenia is a severe form of emotional disorder without any evident biological basis. It is of a psychotic proportion. It is generally thought to be permanent, though it can clearly wax and wane.

Q In terms of a person's ability to make sound contact with reality, what is the significance of a schizophrenic condition?

A Well, it is directly very significant. If a person is clearly schizophrenic one must question his ability to make sound contact with reality.

THE COURT: Can you tell me what the adjective "childhood" adds to it? Of course, this was a child, but is there a particular aspect of the illness that is called childhood schizophrenia?

THE WITNESS: There is a kind of childhood autism which is a real kind of unreachable state. Mr. Mayo was not felt to have that kind of childhood schizophrenia or

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autism, and it really here speaks of a state not particularly different from adult schizophrenia, but which is designated as childhood because you are dealing with a child and because --

THE COURT: Is it implying it might not necessarily continue, for example?

THE WITNESS: No, it would in all likelihood continue even though it was diagnosed as childhood schizophrenia. It is one that people are fairly cautious about making because it is a severe one they carry through life and you want to have fairly-- you have to have fairly good evidence upon which to base it.

THE COURT: I think Mr. Matz asked you, and I would like to know, too, what hebephrenic tendency means.

THE WITNESS: This means that the chief behavior evident is a kind of a silly, shallow, sort of attitude and behavior that is very hard to relate to.

Q In addition to hebephrenic schizophrenia, are there other types of schizophrenia, according to the DSM?

A Yes, four or five others.

Q Of the many types of schizophrenia, which prognosis is the worst in terms of the seriousness of the illness?

A Hebephrenic schizophrenia is accepted generally as having the most severe prognosis, serious prognosis.

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2 Q If someone has once suffered from childhood
3 schizophrenia with hebephrenic tendencies, is it likely
4 he would altogether outgrow that condition?

5 A No, it certainly is not.

6 Q Is it likely that he would altogether become
7 cured of it at some later date?

8 A No.

9 Q Dr. Sallick, this morning before you arrived
10 both Victor Mayo and the attorney who represented him at the
11 1960 trial testified in substance that Victor did not tell
12 the attorney back in 1960 of his prior history of insti-
13 tutionalization and of mental illness.

14 Focusing on Mr. Mayo's particular case and con-
15 dition, could the illness of childhood schizophrenia from
16 which he apparently suffered have had an effect seven years
17 afterward on his ability to consult with his attorney?

18 A I would think that in all likelihood it would
19 have, yes.

20 Q And in your opinion did it in fact have an ef-
21 fect?

22 A Yes, I believe so.

23 Q What was the effect?

24 A Well, I think that the rather consistent descrip-
25 tion of Mr. Mayo's personality and ability to relate to other

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Sallick-direct

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people during childhood would have continued unabated, that he would tend to be passive and withdrawn, that he would not communicate freely or openly with people, and that he would tend to live in his own relatively autistic and withdrawn state.

Q Would it have occurred to him at a subsequent date that he could communicate facts which if they were known by his attorney could help him and probably would help him?

A It might well have occurred to him, but I think in particular the tendency to be passive and withdrawn would have held him back from doing it.

Q I direct your attention to item 17 of the stipulation that appears on page 6 and note that on the copy of Dr. Piana's diagnosis which is presently in custody of the institution where it was prepared, there appears an additional handwritten diagnosis, and the diagnosis that appears on this original copy is "Revised Diagnosis: 000-X28 with schizophrenic reaction childhood type [W]009-550 chronic brain syndrome associated with convulsive disorder."

To what do the numbers refer?

A These are the statistical classifications as recorded in the Diagnostic and Statistical Manual.

Q Can you state the nature of the mental illness

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related by the additional diagnosis?

A By the revised diagnosis?

Q Yes.

A I believe it is what we have been discussing. It is an extremely serious and in all likelihood lasting kind of illness which would be inherent in his personality.

Q And chronic brain syndrome which is an additional item in this particular diagnosis which does not appear in the diagnosis of childhood schizophrenia with hebephrenic tendencies, to what does that chronic brain syndrome refer?

A I think there would be two bases upon which they would put that in. One, obviously, is the history of a convulsive seizure, and the question of an epileptic or other organic basis for it.

And the other possibly also is the degree of retardation which he manifested.

Q I direct your attention now, Dr. Sallick, to item 19 on pages 6 and 7 of this stipulation. Item 19 concerns a hospital report on an EEG conducted upon Victor Mayo in 1953.

What is an EEG?

A That stands for electroencephalogram, and it measures the electrical emissions of the brain, the brain

1 waves, very much in the same way an EKG does with the heart
2 on a cardiogram.
3

4 Q And what is the purpose of an EEG? What is it de-
5 signed to test for?

6 A It is designed to give you knowledge of the pos-
7 sibility of organic disease.

8 Q In other words, neurological or physiological dis-
9 ease?

10 A Yes.

11 Q Can you summarize in layman's terms the essential
12 meaning of this report-- that is, could you state essentially
13 what it says about Victor Mayo's mental capacity, if it
14 states anything about it?

15 A It does not specifically say anything about his
16 mental capacity. It raises the possibility of there being
17 something wrong organically.

18 THE COURT: From what does that impression as it is
19 described here arise in items 1, 2, 3, 4? What among those
20 is unusual? I am not challenging --

21 A No. 1 is perfectly normal.

22 No. 2, you have got the occasional hypersynchronous
23 activity, and short runs of this "spikey" activity. In other
24 words, it suggests that there is an irritable focus there
25 which under certain conditions might kind of run away and

spread over the brain and lead to a seizure of the sort that was recorded.

There are also questions of whether different kinds of epilepsy are associated with uncontrollable behavior but there is not enough here to conclusively interpret anything of that sort.

Q Does the report indicate that there is a tendency toward seizures?

THE COURT: It says it is consistent with convulsive tendency.

I assume that means --

THE WITNESS: It raises the question, and it says they would like to follow up on it.

Q I will now draw your attention to item 22 of the stipulation which appears on page 8, and that concerns the removal of glass from Mr. Mayo's mouth at the time when he was a patient in the Rockland State Hospital.

THE COURT: He was what, about twelve years old then?

THE WITNESS: He was older.

Q He was about 13 at the time?

A Yes.

Q Before you arrived, again, Mr. Mayo testified in substance, I believe, that in the past he has attempted

1 to commit suicide by swallowing pieces of glass and while
2 he could not recall this incident, it may have been con-
3 nected with those efforts.
4

5 My question to you is whether in fact or this
6 tendency at attempted suicide is consistent with the ill-
7 nesses and descriptions of Victor Mayo, previously set forth
8 in documents you have reviewed in court this morning?

9 A Yes, it is entirely consistent, particularly if
10 you look back at Dr. Piana's report. I believe he said
11 that there was a suicidal danger, there was potentially
12 a suicidal danger as well as a homicidal one, I think he
13 said.

14 Q Dr. Piana's report is B, and I think the passages
15 you are referring to appear on page 3.

16 A The first page 3?

17 Q Yes, the first page 3.

18 A It is the bottom of the first page 3.

19 "During his stay here, he had many such episodes,
20 and the potentiality of suicidal or homicidal attempts should
21 be taken into consideration."

22 Q I direct your attention to Exhibit G, a psychiatric
23 report prepared in early January 1961, at a time very shortly
24 after Mr. Mayo had been convicted of the crime arising out of
25 the incident in the candy store.

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Sallick-direct

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Before I ask you questions about Exhibit G, I would like to have marked as Petitioner's Exhibit 11, I believe, the statement signed by the doctor who compiled this report, Dr. Leonard Bolton.

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(Petitioner's Exhibit 11 marked for identification.)

Q Dr. Sallick, the diagnosis given in Exhibit G, the psychiatric report compiled very contemporaneously with the date of the trial and the sentence is, or closely thereafter, I should state, is that Victor Mayo was a schizoid personality.

What does that mean?

A This refers to -- let me start first by saying it is a type of personality disorder, and a personality disorder is meant to describe a chronic and inherent condition which characterizes the subject being described. The schizoid personality describes the sort of person who is withdrawn, passive, who exhibits little emotion, particularly who has difficulty handling aggressive feelings, who relates poorly to other people, and who tends to live an isolated rather internalized sort of existence.

THE COURT: Where is the reference to schizoid personality in Exhibit G?

MR. MATZ: I am speaking now of --

2 THE COURT: I see it. I was looking at F.

3 I'm sorry.

4 Would you say that diagnosis was pretty consistent
5 with everything that has been said about him by previous
6 people?

7 THE WITNESS: Yes, it really is. It is probably
8 the same kind of diagnosis I would have made at that point.
9 To make a stronger one than that you would have needed
10 psychological reports or some kind of more intensive evalua-
11 tion.

12 THE COURT: For my own information, but I think
13 it is relative to the case, too, to what extent does the
14 diagnosis of schizoid personality differ from the diagnosis
15 before of childhood schizophrenia, if it does?

16 THE WITNESS: It does, insofar as childhood
17 schizophrenia is more ominous. It describes a sort of --

18 THE COURT: The "oid" ending generally means in the
19 family of?

20 THE WITNESS: Yes, but schizophrenia per se is a
21 more serious kind of diagnosis that describes the likelihood
22 or the very near potential of total withdrawal and psychosis,
23 where schizoid means the person lives this kind of life pat-
24 tern. It is more on the surface.

25 Q Is it possible, or does it happen sometimes, that

1 a diagnosis of schizoid personality could be changed to
2 schizophrenic upon further evaluation?

3
4 A It is certainly possible. It is possible, for
5 example, that a person who at one time had a schizophrenic
6 diagnosis would during a period of relative stability appear
7 as a schizoid person, while a person with a schizoid diag-
8 nosis might during a period be diagnosed as schizophrenic.

9 MR. MATZ: I would like to offer the exhibit which
10 has been marked as Petitioner's Exhibit 11.

11 MR. HOFFMAN: Your Honor, the only objection I have
12 to that -- I don't object to the psychiatric report, of
13 course, because that is already annexed to the stipulation,
14 but the other part of the exhibit is a statement by the psy-
15 chiatrist up at Elmira --

16 THE COURT: Is it a current statement or an old
17 one?

18 MR. HOFFMAN: It is a current one.

19 MR. MATZ: If I may interrupt, it is signed by
20 Dr. Bolton and according to a telephone conversation he had
21 with me last week, it was signed on January 12th. However,
22 he forgot to put in the date.

23 THE COURT: Of this year?

24 MR. MATZ: Of this year, 1972.

25 THE COURT: Is it offered as an elucidation by

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Sallick-direct

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the person who wrote the report of what the report means?

MR. MATZ: Exactly.

THE COURT: I guess Mr. Hoffman is saying he would like to be in the position of asking Dr. Bolton some questions.

MR. HOFFMAN: I don't think this is the proper witness to be putting it in.

THE COURT: You are correct technically, but without having Dr. Bolton come down, I would like to have the benefit of his thinking.

Have you seen the letter?

MR. HOFFMAN: Yes. I have no objection on the grounds of authenticity. The only thing that troubles me it is a letter written ten years after the report was written and it should be taken into consideration.

THE COURT: Yes.

MR. MATZ: And it states he has no independent recollection of Victor Mayo.

THE COURT: If there is anything you feel, Mr. Hoffman, in effect you would like to cross-examine him on by letter, I would be perfectly glad to receive any further letter that he writes in answer to any questions that you put to him.

MR. HOFFMAN: That is fair.

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Sallick-direct

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MR. MATZ: It is received then in evidence?

THE COURT: Under those conditions it is received.

(Petitioner's Exhibit 11 received in evidence.)

Q I would like to show you a copy of this exhibit which is the statement of the doctor who prepared Exhibit G to the stipulation.

I ask you whether you agree with certain definitions that Dr. Bolton provides for some of the terms he means.

In item 2 of the statement he says that "very flat," a term which appears in the report, means unexpressive, lacking animation and displaying emptiness.

Is that a fair meaning of the term "flatness"?

A It is.

MR. HOFFMAN: If I may interject, the important thing is what Dr. Bolton meant.

THE COURT: I suppose this is obviously elucidation of what Dr. Bolton meant and it doesn't make much difference what Dr. Sallick thinks.

MR. HOFFMAN: We are getting an elucidation of an elucidation.

MR. MATZ: All right, your Honor. I will drop this line of questioning.

Q Dr. Sallick, the condition of schizoid personality

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Sallick-direct

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that apparently existed in late December of 1960, early January 1961, would that condition have existed four months prior to the date of the report if it existed then?

A Repeat it.

Q Would the condition of schizoid personality Mr. Mayo was diagnosed as having at the time that Exhibit G was prepared, would that condition have existed four months previously?

A Yes.

Q Would it have existed six months previously?

A Yes, it would.

Q And nine months as well?

A Yes.

Q Can you state how a person who is afflicted with schizoid personality, how that condition affects such a person's ability to consult with other people and specifically to consult with an attorney?

A I think that if you have a person who is -- who tends to be extremely withdrawn, to live much of his life within his own mind or imagination, to have difficulty expressing feelings or acting effectively on his own -- I don't want to say acting effectively on his own behalf -- but who has difficulty acting aggressively, and here I think the term "aggressive" means not just destructively but also

2 aggressive as opposed to passive-- I think a person who has
3 all of these characteristics is going to be a very difficult
4 person to communicate with, to explain things to, and to
5 obtain cooperation from.

6 Q Dr. Sallick, based on the available information
7 which you have reviewed, and in particular the information
8 which is set forth in the stipulation of facts, specifically
9 the fact that nine and a half of Mr. Mayo's first eleven
10 years were spent in institutions, the fact after a few months
11 interval he then began to spend and did spend five and a half
12 additional years in state mental hospitals, the fact there
13 are medical references to retardation, organic lesions, to
14 epilepsy, or convulsive seizures, the fact that he had been
15 diagnosed at one time as a childhood schizophrenic of a
16 hebephrenic type, and another time as a schizoid personality,
17 based on all those facts, sir, can you state from April through
18 September of 1960^{if} Victor Mayo had a rational and not just a
19 factual understanding of the crime proceedings against him?

20 A I think if rational means understanding the whole
21 picture of the whole situation, and it means taking into
22 account what other alternatives there are, what he could
23 possibly do in his own interest, I think if rational means
24 that that would be highly unlikely that he had that kind of
25 a rational awareness of the big picture of what was going on

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Sallick-direct/cross

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with him.

MR. MATZ: I have no further questions.

Thank you, Dr. Sallick.

THE COURT: Mr. Hoffman.

CROSS-EXAMINATION

BY MR. HOFFMAN:

Q Dr. Sallick, have you ever worked in a prison?

A No, I haven't specifically worked in a prison.

Q Have you worked with the criminally insane?

A In terms of treating them, no. I have interviewed a number of criminally insane but in terms of working with them towards goals of improving themselves, no.

Q Have you conducted any psychiatric examinations to determine the competency of defendants to stand trial?

A Yes, I have.

Q How many have you conducted?

A 25 or so.

Q In connection with the discussion of IQ I believe you testified that a person whose IQ was between the levels of 70 and 85 was educable?

A Right.

Q Would you describe a little further what you meant by the term "educable," what level of education that person could attain, and what reading and writing skills?

2 A Well, it means educable to the point of taking
3 care of himself in life, it means holding a simple job. He
4 would clearly be able to read or write, if he was taught to
5 do so. He would be able to care for his own personal hygiene.
6 It is merely used as a cut-off point to help people in plan-
7 ning programs about where they can put their efforts.

8 THE COURT: Is such a person considered in a class
9 of what can be called retarded?

10 THE WITNESS: Yes. Up to 85.

11 THE COURT: That is dull normal?

12 THE WITNESS: Yes.

13 Q Would such a person be capable of understanding he
14 committed a crime?

15 A Yes.

16 Q Would such a person be capable of understanding
17 any aspect of legal proceedings, whether it was a criminal
18 proceeding or a commitment proceeding or a civil proceeding?

19 A Straightforward aspects like that in their fac-
20 tuality I think he can understand.

21 MR. MATZ: May I have that question reread?

22 (Question read.)

23 Q You mentioned before that these tests, these IQ
24 tests, do not have much validity at the age of six but by the
25 age of ten they do have much greater validity?

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A Yes.

Q What is the validity of the test administered at the age of eight?

A Well, any IQ scores have got to be taken with more than a grain of salt. If an IQ is done carefully, it can pretty effectively determine a person's potentialties at the age of eight.

Q Directing your attention to Exhibit A which is annexed to the stipulation under the psychological examination on the first page, would you explain more fully what these various IQ ratings mean, verbal IQ, 76, performance IQ, 87.

What is the difference between a verbal and performance IQ?

A Verbal IQ would be based upon tests to assess items such as vocabulary, understanding certain word problems.

Performance would be based more on an ability to do something like a puzzle.

Q Would that involve comprehension, then?

A Performance would involve less comprehension than verbal. In either case it is not so much comprehension that is involved -- I mean you give a person a simple puzzle and you ask him to do it, he doesn't have to comprehend much.

Q Would someone with a performance IQ of 87 be in a normal range so far as performance IQ was concerned?

2 A Well, an IQ is an overall composite of many tests.
3 You may get a great deal of scatter on some IQ's. For ex-
4 ample, some very bright people can score below normal in
5 certain areas, and this is the reason they take an amalgam
6 of types of tests to put together to make up for one test.
7 Therefore, I don't think that you can base his ability on
8 any one of the component parts.

9 It also said he had relatively little scatter so
10 while there was a discrepancy, this is not an awfully marked
11 one, a discrepancy of 7 points. I take it back, it is a
12 discrepancy of 11 points, but I think they say there was not
13 a great deal of scatter. I may be wrong.

14 Yes, "performance was fairly even and regular with
15 best results on items requiring structuralization and abstrac-
16 tion of concrete materials."

17 Q Doctor, would a diagnosis of emotional flat response
18 have anything to do with a person's intelligence or level
19 of comprehension?

20 A Yes, it certainly could. A person with an ex-
21 tremely low IQ might appear flat, but in more normal --but
22 within the kind of range we are talking about, it is per-
23 fectly-- one would expect a person of an IQ in the 80s to be
24 able to express a fairly wide range of emotions.

25 THE COURT: In other words, the emotional flatness

1 in such a situation is not a necessarily accompanying char-
2 acteristic of low dull intelligence?
3

4 THE WITNESS: Right.

5 Q You testified that childhood schizophrenia was
6 a severe emotional disorder which would wax and wane.

7 Would you please precisely define what you mean
8 by wax and wane?

9 A I said it might wax and wane. During periods of
10 stability a person with a schizophrenic illness can very often
11 maintain a fairly reasonable and level pattern of behavior. Then
12 if you add some additional stress you begin to see more
13 symptoms. In addition, there is also a question with a
14 schizophrenic illness of whether or not it does not have
15 some pattern of its own entirely unrelated to external
16 stimuli.

17 Q During a period of stability would the person's
18 ability to comprehend become greater than during a period of
19 instability?

20 A I think in all likelihood there would be some vari-
21 ance, yes.

22 Q If a person was suffering from childhood schizo-
23 phrenia or a schizoid personality and had difficulty in estab-
24 lishing relationships with other people, would such a person
25 be capable of testifying at a criminal trial?

2 A I don't know quite what you mean by "capable".

3 Q Would he have enough mental presence or enough
4 understanding of what was going on during the proceedings
5 to be able to take the witness stand?

6 A Yes.

7 THE COURT: And tell what happened?

8 THE WITNESS: In general, one would expect him
9 to be oriented, to know grossly what was happening.

10 THE COURT: In other words, we are not talking
11 about a situation of somebody suffering from delusions?

12 THE WITNESS: Right. Or disorientation.

13 Q And would he be capable of answering questions on
14 the witness stand, understanding questions, giving answers
15 to questions?

16 A Yes.

17 Q Would he be capable of discussing his situation
18 with a probation officer or a parole officer or some
19 medical type of person?

20 A Yes, certainly. I only hesitate because, you know,
21 if you don't look for something you often don't find it.
22 In terms of a person with a schizophrenic illness-- he can
23 seem quite normal at times. You would expect that he
24 could carry on a reasonable conversation about simple things.

25 Q During the period he appears normal, can you express

2 an opinion about his level of comprehension, his ability
3 to think rationally or understand legal proceedings?

4 MR. MATZ: Could you ask those questions sepa-
5 rately because I think they are different questions.

6 MR. HOFFMAN: Yes.

7 Q Could you offer an opinion about his ability to
8 comprehend during a period of apparent normalcy?

9 A I think it would still be limited by his inherent
10 personality limitations.

11 THE COURT: You mean in this case?

12 THE WITNESS: In this case, yes. In other words,
13 while he could understand the facts, in all likelihood,
14 and can give logical responses, when it calls for a personal
15 kind of initiative, this might very well be lacking.

16 THE COURT: You are referring to the flatness and
17 passivity, and so on?

18 THE WITNESS: Yes.

19 MR. HOFFMAN: I have no further questions.

20 THE COURT: Thank you very much, Doctor.

21 (Witness excused.)

22 MR. MATZ: Your Honor, at this time I would like
23 to have marked for identification and offered in evidence
24 Petitioner's Exhibit 12, which is a letter dated December 15,
25 1971, to me from the secretary to Justice Barshay.

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2 I would like to state at this time out of courtesy
3 to Justice Barshay, and in deference to Mr. Hoffman's de-
4 sire to give Justice Barshay an opportunity to state what his
5 standard operating procedures were in 1960, Mr. Hoffman
6 and I have agreed to interview Mr. Justice Barshay as soon as
7 we can in his chambers and if possible to stipulate to what
8 his testimony would be as to those items.

9 I would like to note for the record that the sub-
10 stance of this letter which I have just offered into evi-
11 dence is that Justice Barshay has no independent recollection
12 of the case of Victor Mayo after having read the trial and
13 sentencing transcripts of that 1960 trial, which I had af-
14 forded him.

15 THE COURT: Very well.

xx 16 (Petitioner's Exhibit 12 marked for identi-
17 fication.)

18 MR. MATZ: The petitioner rests, your Honor.

19 THE COURT: Mr. Hoffman, do you have anything?

20 MR. HOFFMAN: I have two witnesses, your Honor,
21 but I assumed the morning session would be taken up with the
22 petitioner's witnesses.

23 THE COURT: All right. Why don't we get back together
24 then at two o'clock.

25 (Luncheon adjournment.)

AFTERNOON SESSION

2:00 p.m.

THE COURT: Please call your witness.

..

GERALD

[HERALD]

P.

HECHT,

called as a witness

by the respondent, being first duly sworn, testified
as follows:

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q Mr. Hecht, where are you currently employed?

A Probation Department, Supreme Court, for the
Second Judicial District in Brooklyn.

Q Will you tell the Court what some of your duties
are in the Probation Department?

A I am the supervising probation officer. My as-
signment is with the investigation division. I supervise
the unit of probation officers, and I have a number of
other ancillary duties.

Q How many years of experience have you had in the
Probation Department?

A More than 17 years of continuous employment.

Q Would you tell the Court briefly what the various
aspects of your experience has been with the Probation De-
partment?

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2 A I think I have had assignments in virtually every
3 aspect of probation work; in-take investigation, supervision;
4 I have also conducted special investigations for the Court,
5 I have served as a consultant in various projects, and in
6 various special cases, and I am currently the field instruc-
7 tor for the Fordham University School of Social Services
8 and the Columbia School for Social Work in connection with
9 the training of two of our men.

10 Q Would you tell the Court briefly about your edu-
11 cational background, Mr. Hecht?

12 A I hold a Bachelor's degree from New York University,
13 a Master's degree in psychology from New York University,
14 a Master's degree in Social Work from the Columbia University
15 School of Social Work; and additional credits toward a
16 doctorate in criminology at New York University.

17 Q Are you familiar with the work of Mr. ^{Edward Levy} [Edwin La.
18 Vallee?]

19 A Yes, I am.

20 Q Will you tell the Court why Mr. ^{Edward Levy} [Edwin LaVallee]
21 could not be here today without going into too much detail?

22 THE COURT: I assume you all know who ^{Edward Levy} [Edwin LaVallee]
23 is.

24 MR. HOFFMAN: He prepared the probation report in
25 the 1960 case.

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Hecht-direct

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THE COURT: Is he still with the Service?

THE WITNESS: No, he has since retired.

THE COURT: That is an adequate explanation,
isn't it?

MR.MATZ: It is adequate to me.

Q Are you familiar with Mr. ^{Levy's} [LaVallee's] work?

A Yes, I am.

Q Have you worked with Mr. ^{Levy} [LaVallee] on various cases
or projects?

A I have not worked with him in joint cases or
projects, no, but I am familiar with his work.

Q Can you express an opinion as to the quality of
his work as a probation officer?

A Yes. Mr. ^{Levy} [LaVallee], in my opinion, was one of
the most dedicated workers in the Probation Department that
I have ever -- with whom I have ever had any contact, a
very client-oriented individual who would go to all lengths
to bring service to the people.

Q Do you know how many years Mr. ^{Levy} [LaVallee] was as-
sociated with the Probation Department in Kings County?

A Yes. He came on staff to the then Probation De-
partment of the Kings County Department in 1943, and remained
in continuous employment until November 15th of 1971, when
he retired. Previous, about a year previous to that latter

1
2 date, he had intermittent sick leave for approximately a
3 year.

4 THE COURT: In other words, at the time of the
5 case involving Mr. Mayo here, the latter part of 1960, he
6 had about 17 years of experience, is that right?

7 THE WITNESS: He had more than that because by
8 the time he came to our department he had at least eight
9 years of experience as a probation official with the City
10 Magistrate's Court.

11 THE COURT: I see.

12 Q Would you tell the Court something of Mr. ^{Levy's} [LaVallee]'s
13 educational qualifications, please.

14 A Our personnel records disclose that Mr. ^{Levy} [LaVallee]
15 holds a Bachelor of Science degree from Teachers College,
16 Columbia University, a Master of Arts degree in Guidance
17 from the same institution, and an additional 36 credits in
18 Social Work, 32 of which were taken at the Fordham University
19 School of Social Services and four at the Columbia University
20 School of Social Work.

21 Q Mr. Hecht, in the year 1960, had the department
22 specified certain regulations or procedures having to do
23 with a defendant who was mentally incompetent?

24 A Our probation officers from as far back as I can
25 remember, in fact from the time I came back on staff, were

1 all instructed to pay special attention in the area of
2 mental competency or any unusual behavior for which we might
3 suggest in our reports or our recommendations further evalu-
4 ation by competent psychiatric staff.
5

6 Q Are these guide lines set down in any publication
7 or document?

8 A I have before me, if your Honor would permit me to
9 refer to it--

10 THE COURT: I don't know that current instruc-
11 tions would be very illuminating. If it is the fact the
12 current instructions are simply the most recent version
13 of something that's been basically the rule as far back as
14 the case we are interested in then I would be willing to
15 hear what it is, but what I am really interested in are
16 the rules back at that time .

17 A Perhaps I can more appropriately respond by in-
18 dicating the 1960 Manual for Probation Officers in New
19 York State, if I may read from it -- this is in connection
20 with investigations for adult felons, under a subject area
21 heading Mental and Physical Condition, indicates as fol-
22 lows:

23 "Information regarding this topic will be included
24 in the offender's social development previously given in
25 this report. This heading should be used only if there

1 are unusual mental or physical problems presented at the
2 present time, for example, if the offender has any
3 physical or mental disability which may affect his employ-
4 ment or which may require special attention should insti-
5 tutionalization be necessary, this should be so stated.
6 If he is on convalescent care from a state hospital or known
7 to a psychiatric clinic, the recommendations of the psy-
8 chiatrist should be stated here. If there is a continued
9 history of psychiatric referrals, of medical referrals,
10 give summary."

12 This information is also contained in an earlier-

13 MR. MATZ: Could you specify the page of that
14 manual from which you are reading?

15 A That is page 513 of the Manual for Probation Of-
16 ficers in New York State, 6th Edition Revised.

17 THE COURT: I think you were about to refer to the
18 printed document underneath that, the red book, were you
19 not?

20 THE WITNESS: Yes. There was an earlier general
21 rule from the Division of Probation, New York State, which
22 includes page 10, item 3, Probation Investigations, Rule 7:

23 "Every investigation of an adult offender made
24 by a probation officer either publicly salaried or voluntary,
25 and submitted to the Court shall include as minimum the

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following facts." One of these is item B, Offenders Social History, Section F, Mental and Physical Condition.

There is no elaboration on it.

THE COURT: If I understand you correctly, at the time of the case we are concerned with, that is, the latter part of 1960, it was the normal procedure for members of your department who were making a pre-sentence report, and that is what we are talking about, to include in pre-sentence reports a description of the social background and the mental history or condition of the defendant?

THE WITNESS: That is correct, your Honor.

Q Would it therefore be correct to say that if a defendant who was being interviewed exhibited some form of either abberation or inability to comprehend that this fact would be noted by the probation officer on the report?

A Yes. Our probation officers are instructed to note anything which might be deemed unusual, and if in their judgment it is felt that further psychiatric intervention is necessary, at least for diagnostic purposes, this matter is brought to the attention of his supervisor.

Q Was this true in 1960?

A Yes.

Q Mr. Hecht, have you had an opportunity to examine the probation report that was prepared for Victor Mayo in

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this case?

A Yes, I have.

MR. MATZ: Are we speaking of the pre-sentence report attached as Exhibit E to the stipulation?

MR. HOFFMAN: That is correct.

MR. MATZ: I understood there were other reports as well, which is the only reason I asked.

THE COURT: Is it attached to the stipulation?

MR. HOFFMAN: Yes. It is Exhibit E, your Honor.

THE COURT: All right.

Q Based on your personal observation of this probation report and upon your own experience as a probation officer and upon your experience with Mr. ^{Levy's} [LaVallee's] work as a probation officer, can you express an opinion as to what Mr. ^{Levy} [LaVallee] would have done at this time if it had been apparent to him that the defendant was either acting in an aberrational way or that the defendant was incapable of understanding his questions and incapable of communicating with him?

A Yes. I think that if this was so Mr. ^{Levy} [LaVallee] would have made note of this in his written report, and it is quite likely that he would have pursued this orally with his supervisor.

THE COURT: As a matter of fact, he did make note

1 of the subject in his report, didn't he? I see that on
2 page 3, at the bottom. It says, "The defendant Mayo has a
3 history of mental illness having at one time been confined
4 in Rockland State Hospital. There were no manifestations
5 of erratic behavior up to the time of this crime."
6

7 MR.HOFFMAN: Yes.

8 THE COURT: I don't know, and I don't know whether
9 anybody here can tell me-- Mr. Hecht, if you have any
10 thoughts on the subject I would like to know them -- what
11 he ^{means} [mans] by "there were no manifestations of erratic behavior
12 up to the time of this crime."

13 I suppose he was referring to information he got
14 from somebody else because he wouldn't have known on his
15 own.

16 THE WITNESS: This is perhaps further elaborated
17 on page 6D, Mental and Physical History. "When released from
18 the hospital" -- that line.

19 THE COURT: Yes. Read what it is.

20 THE WITNESSES: "When released from the hospital on
21 January 10th, 1959, he was placed under the supervision of
22 the aftercare division. The social worker, Miss ^{Thulin} [Dolan],
23 indicates that the defendant's progress was considered as
24 good up until the time of his crime-- arrest." The aftercare
25 division was even considering his discharge.

1 THE COURT: And I took it, when I read that, to
2 mean that he was actually physically out of the hospital
3 at that time but they still had control and supervision of
4 him, is that right, and discharge meant eliminating that
5 control and supervision?
6

7 THE WITNESS: That is correct, your Honor.

8 Q So that if it had appeared to Officer ^{Levy} [LaVallee]
9 that the defendant was not comprehending his questions and
10 was not able to make meaningful responses to his questions,
11 would this fact have been noted in the probation report?

12 A In my judgment, it would.

13 MR. HOFFMAN: I have no further questions.

14 THE COURT: Thank you, Mr. Hoffman.

15 Mr. Matz.

16 CROSS-EXAMINATION

17 BY MR. MATZ:

18 Q Mr. Hecht, may I see a copy of that manual from
19 which you were reading, and in particular page 513?

20 A Surely.

21 Q You were reading from page 10 of the other one?

22 A Yes, I think so.

23 Q Were you the supervising probation officer in 1960?

24 A No, I was not.

25 Q So you did not supervise Mr. ^{Levy} [LaVallee] in 1960,

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is that correct?

A No.

Q With respect to Mr. ^{Levy} [LaVallee], was he a field officer in 1960?

A Yes, he was.

Q He was not a senior probation officer at the time, was he?

A No.

Q And he was not a supervising probation officer either, was he?

A No, he was not.

Q What was Mr. ^{Levy's} [LaVallee's] special background and training? In what area was it? Wasn't it in the area of Vocational Guidance?

A His academic training, as I have been able to gather from the personnel records, indicate he held a Master's degree in Guidance. The specific nature of the area of his competency I am not familiar with.

Q To your knowledge he did not hold a Master's degree in psychology or have any expertise in the area of detecting mental illness, any special expertise a probation officer may not have had himself?

A I think that he was probably, given the period of time when he served, especially from 1943 on, for those

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17 years on to 1960 --

Q I know you focused on Mr. ^{Levy's} [LaVallee's] credentials but the focus of this examination is on Mr. Mayo.

With respect to his credentials, did he have specific training in the profession of psychology, for example?

A Not to my knowledge. I don't know if he ^{took} [too] psychology courses or not if that is what you are getting at.

Q Yes, and the answer is you do not know?

A I don't know.

Q Did you work with Mr. ^{Levy} [LaVallee] on the case of Victor Mayo in 1960?

A I did not.

Q Did you speak to him in 1960 about the case of Victor Mayo?

A Not to my knowledge.

Q In respect to the probation report itself-- that is, the presentence report which is attached as Exhibit E to the stipulation-- other than the information that appears on page 2, in the paragraph entitled "Defendant's Statement to Probation Officer," isn't it true that the rest of the information in that report could have come from other sources?

A Yes. There is much information in this report which does come from other sources, but a probation report,

or a presentence investigation, more specifically, is one which draws together information from several sources and which produces, in addition, an evaluative summation.

Q I understand that, Mr. Hecht, but my question is whether it is clear from reading the report where the source of each information was apart from that-- that is, whether it was clear the source of information was Victor Mayo himself other than this particular paragraph that appears on page 2.

THE COURT: I notice there is some information on the next page, for example, that apparently comes from Mr. Mayo. It says "the defendant Mayo admits commission of the crime," and so forth.

MR. MATZ: That could have been ^{taken} ~~taken~~, your Honor, from the transcript of the trial itself, where Mr. Mayo testified.

THE COURT: Yes, it could.

THE WITNESS: Mr. Mayo was interviewed by Mr. ^{Levy.} [LaVallee.] It is likely he was interviewed by him in the Raymond Street jail judging from the date and the jail time.

THE COURT: I don't think we need to hold Mr. Hecht to rendering an opinion about this. I think that I can read it having in mind your thoughts on the subject and come to my own conclusions.

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2 Q Do you know from your own personal knowledge how
3 many times Mr. ^{Levy}[LaVallee] met with Mr. Mayo?

4 A No, I don't.

5 Q What is the usual number of times a field officer
6 in the Probation Department meets with a defendant awaiting
7 sentence ^{or}[of] a defendant who is incarcerated in jail?

8 A For the most part it is once.

9 Q One time. And during that one interview -- well,
10 strike that.

11 Is the chief reason why it is only one time the fact
12 that probation officers now and in 1960 are forced to labor
13 under very burdensome caseloads?

14 A No, that wouldn't be the only reason.

15 Q But is it one reason?

16 A This is one reason.

17 Q Is it your best judgment then that Mr. ^{Levy}[LaVallee]
18 met with Mr. Mayo on one occasion?

19 I know that you don't know.

20 A I don't know.

21 THE COURT: I take it that is the probability.

22 Q Do you know for how long they met with each other?

23 A I don't know the time. Generally an interview
24 with an inmate takes about an hour. If there is some re-
25 sistance or some difficulty in communication it will take

longer.

Q Do I understand correctly from your previous testimony that during this period, which ordinarily lasts about an hour, the probation officer is supposed to go into just about all facets of the person's life that he is interviewing?

A Yes.

Q In 1960, did the probation office distribute to each of its field officers a manual other than the manual which you just handed to me, a formal manual that specifically contains instructions on how to detect mental incompetency?

A Not to my knowledge.

Q I am looking at page 513 of the Manual for Probation Officers in New York State, 6th Edition Revised, 1960, from which you quoted previously. It says in this paragraph 10, on page 513 that "a heading on mental condition should be used only if there are unusual mental or physical problems presented at the present time, e.g., if the offender has any physical or mental disability which may affect his employment or which may require special attention should institutionalization be necessary, this should be so stated. If he is on convalescent care from a state hospital or known to a psychiatric clinic, the recommendations

1 of the psychiatrist should be stated here."

2
3 Does the probation report or the entire file of
4 Victor Mayo contain recommendations of a psychiatrist?

5 A The report itself does not contain, as far as I
6 can see, any recommendations of a psychiatrist. It does
7 contain information--

8 Q That answers my question, sir.

9 Now, if there were -- if it in fact was the case
10 that at the time Mr. Mayo was the subject of the probation
11 interview, the presentence interview, I should say, that he
12 had been on convalescent care from a state hospital, in view
13 of the provision from which I just read that required the
14 report of the psychiatrist to be introduced, would you
15 agree that this particular provision of the manual at
16 least was not complied with in the case of Victor Mayo?

17 A No, I think that that manual has to be viewed in
18 the light of an overall guide lines for people working in
19 probation for the State, one which is extremely flexible
20 and one which, incidentally, the then Kings County Probation
21 Department only looked upon as a bare guide line.

22 In our reports we have gone much beyond what the
23 State required.

24 Q But in this particular case if there were a situa-
25 tion existing in which Mr. Mayo had been on convalescent care

1 should there have been, according to this probation report,
2 a recommendation of the psychiatrist, who was treating him
3 at the time?
4

5 A Our interpretation of that guide line is to obtain
6 information from the aftercare unit of the state mental
7 hospital.

8 Q That's right.

9 A Whether it is provided by a psychiatrist or any
10 other member of that department.

11 Q So your department felt free, in effect, to vary
12 from the guide lines as you call them, set forth in this
13 report, is that correct?

14 A To the extent that you are indicating.

15 THE COURT: In other words, you felt reference to
16 the situation here that ended up with the fact that they
17 were thinking of discharging him, and so on, was in substan-
18 tial compliance with that guide line, is that right?

19 THE WITNESS: Yes. The only one who can discharge
20 anyone from aftercare status is a psychiatrist.

21 THE COURT: So the implication is that he must have
22 thought that or no such recommendation would have been made.

23 Q Have you reviewed the Mayo file in the past few
24 weeks?

25 A Yes.

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Reg Hecht - cross 100

Q Does that file contain any reports from doctors at mental hospitals? I am not speaking now of orphanage institutions or the like, but state mental hospitals; does it contain reports that such doctors prepared that include diagnoses previously given to Victor Mayo?

A The report does does not contain a report -- the file does not contain a report from a psychiatrist.

MR.MATZ: Thank you.

No further questions.

THE COURT: Do you have any other questions, Mr. Hoffman?

MR. HOFFMAN: No.

THE COURT: Thank you very much, Mr. Hecht.

I'm sorry I will have to call a short recess.

I will be back in about 25 minutes.

(Recess.)

...

A L B E R T V. De M E O, called as a witness by the respondent, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMAN:

Q Professor DeMeo, where are you currently employed?

A Associate Professor of ^{Law} [Psychology] at Brooklyn Law

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DeMeo- direct

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School.

Q Do you teach the subject of Criminal Law?

A My specialty is Evidence, Criminal Law, Criminal Procedure, and Trial Practice.

Q What was your employment previous to that?

A 1940 to 1946 I was Assistant United States Attorney for the Eastern District. I was a Special Assistant United States Attorney General on the staff with the Honorable Tom C. Clark. In 1946 I left the United States Attorney's Office and I became a member of the Kings County District Attorney's Office and remained there until 1969.

Q Professor, approximately what date did you begin handling felony trials?

A Since 1942 I was also engaged in trial practice both for the Federal Government and with the District Attorney's office.

Q In your capacity as an Assistant District Attorney of Kings County, can you estimate how many felony trials you handled in a given year; a rough estimate?

A Thousands, which would include those cases where we took a plea, that I handled literally thousands of cases.

Q Are you familiar with the criminal provisions of the New York Code of Criminal Procedure regarding psychiatric examination?

1 A Generally, I am.

2 Q ARE you familiar with the decisional law concern-
3 ing psychiatric --
4

5 A When Pate vs. Robinson came down, followed by
6 People vs. Hudson, we were all alerted.

7 Q Have you any independent recollection of this de-
8 fendant Victor Mayo?

9 THE COURT: When was Pate, do you remember?

10 THE WITNESS: I think that was about six years
11 ago, or seven years ago.

12 THE COURT: A post-dated case?

13 THE WITNESS: Yes. Then Hudson followed.

14 A I have no independent recollection of this case.

15 Q Have you examined any papers of this case in the
16 past week or so?

17 A You permitted me to look at the official file
18 of the District Attorney's office. I think it was Thursday
19 of last week; just for about ten minutes.

20 THE COURT: According to your records did Profes-
21 sor DeMeo handle this case when he was on the staff?

22 MR. HOFFMAN: Yes, he did.

23 Q Professor, I show you Respondent's Exhibit A for
24 identification.

25 Would you tell the Court what this document is?

1 A This apparently is a Xerox copy of the official
2 trial record maintained by the District Attorney for each
3 criminal case, and the record is to contain the daily dis-
4 position of any proceeding affecting that particular case.

5 Q Does this document indicate the dates on which the
6 defendant appeared in court?
7

8 A The defendant appeared in court for the first time
9 on May 11th, 1960 for trial.

10 Q Would you continue?

11 A That was before the Honorable Judge Barshay, and
12 I might indicate that at this time the procedure of the -
13 1960, this was the County Court before the merger with the
14 Supreme Court. The cases would be assigned to a judge and
15 they would remain with him until disposed, and so conse-
16 quently I noticed that Judge Barshay then was assigned to
17 part 4 of the County Court, so after the initial arraign-
18 ment, which unfortunately -- yes, it appears that he was
19 arraigned soon after April 20th, 1960 --

20 Q Excuse me, Professor DeMeo, is this your hand-
21 writing on the document?

22 A Part of it is. You must understand that the case
23 may have been handled by other Assistants, and I recognize
24 the various names.

25 Q And this document does reflect the date of various

1 court appearances?

2 A Absolutely.

3 Q What are the dates?

4 A He appeared in court the first time May 11th, 1960.
5 It then was marked off for trial and appeared again on
6 June 30th. Well, there is a reason; at the request of the
7 defendant.
8

9 It then appeared again on the calendar July 19.
10 It again appeared on the calendar July 28. Thereafter
11 August 1st, thereafter September 11, when I had it the
12 first time. It was ready and passed until September 12th,
13 and then on the 12th of September I proceeded with the
14 trial which continued until September 13th, when Judge
15 Barshay found each of these defendants guilty of robbery
16 in the third degree.

17 Q Was this record maintained in the regular course
18 of business?

19 A Yes, required to be maintained.

20 THE COURT: You have no objection to its introduc-
21 tion, I take it, Mr. Matz?

22 MR.MATZ: No, I don't.

23 THE COURT: Received.

24 (Respondent's Exhibit A received in evidence.)

25 Q Professor DeMeo, based on your many years of

1 experience as an Assistant District Attorney in Kings
2 County, and on the basis of the many felony trials that
3 you handled, would you advise the Court as to what procedure
4 you would have followed in a criminal trial where it ap-
5 peared to you that the defendant was incapable of under-
6 standing the legal proceedings that were taking place?
7

8 A If the defendant, or a defendant, exhibited any
9 indication that he did not understand the nature of the
10 proceedings or could not in any way consult properly with
11 his attorney, or appeared to be disoriented or gave any
12 manifestation of irrationality, I would then have made a
13 motion before the Court to have the defendant committed
14 to Kings County Psychiatric Hospital for a preliminary de-
15 termination of his mental capacity to stand trial.

16 Q Based on your reading of the records in this case
17 during the past week, do you recollect any such conduct
18 on the part of this defendant here?

19 THE COURT: It seems to me it is impossible for
20 Professor DeMeo to answer that because he said earlier,
21 unless I misunderstood him, he doesn't remember the case,
22 in particular.

23 THE WITNESS: No, I don't remember the case in
24 particular but I did review the District Attorney's file,
25 particularly to see if there was anything in the file in

1 relation to this defendant Mayo to indicate that he had
2 any prior history of emotional or mental disturbance, and
3 the records which I called the Attorney General's attention
4 to indicated nothing of that nature.
5

6 But, in addition thereto, this defendant was tried
7 before one of the truly great criminal lawyers of our time,
8 Judge Barshay, who -

9 THE COURT: I have a very high regard for him.

10 THE WITNESS: Yes, and I have tried many, many cases
11 when he was a defense attorney, and I know the character
12 and the quality of Judge Barshay, and I had worked before
13 him for many, many years, as a trial assistant, that if
14 this defendant exhibited anything that would have indicated
15 that he was then emotionally disturbed, Judge Barshay
16 would have been the first one--

17 MR.MATZ: Objection, your Honor. I think Professor
18 DeMeo is qualified to explain what his own practice would
19 be, but Justice Barshay will be interviewed according to--

20 THE WITNESS: I am here to answer questions.

21 THE COURT: I take it that Professor DeMeo is also
22 giving me his process of thinking as to how he reached the
23 conclusion there probably was no such, and one of his prem-
24 ises is that Judge Barshay was expert in these matters, and
25 I take into account in weighing Professor DeMeo's testimony

1 the comment you have made, but I am agreeable to his giving
2 his thoughts.
3

4 THE WITNESS: In addition thereto, I was permit-
5 ted to read the minutes of the trial, which I conducted,
6 and I was particularly interested to see if there had been
7 any disturbance on the part of this defendant which would
8 have to be recorded in the minutes by the stenographer so
9 that we - - I mean the entire court process-- would have
10 been alerted that perhaps this defendant was emotionally
11 sick, and there isn't a disturbance or anything of that
12 nature.

13 THE COURT: Without meaning to minimize the sig-
14 nificance of what you said, summing it up correctly, do
15 I understand you to say on your examination of the file
16 you find nothing to indicate the defendant ever exhibited
17 any such behavior ^{as} [was] would have triggered or alerted an
18 examination?

19 THE WITNESS: You are absolutely right, Judge.

20 MR. HOFFMAN: I have no further questions.

21 CROSS EXAMINATION

22 BY MR. MATZ:

23 Q Professor DeMeo, did you ever speak with Victor
24 Mayo before the date of the trial?

25 A No, sir.

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2 Q So the only time you spoke with him was in court
3 the day of the trial, is that correct?

4 A I never spoke to the defendant. I cross-examined
5 him. There is a difference in speaking with the defendant.

6 Q In any event, the first time you had an opportunity
7 to engage in some kind of oral colloquy with him was in court
8 on the day of the trial, is that correct?

9 A Under cross-examination.

10 Q I believe you stated on your direct testimony if
11 there had been manifestations of irrationality, a term which
12 I think you used, if I understood you correctly, it would
13 have been recorded in the minutes and you would have been
14 particularly alerted in terms of making observations in
15 terms of Mr. Mayo's capacity or competency to stand trial.

16 By the term manifestations of irrationality, you
17 mean he would have been acting out his problems in a bizarre
18 or extrinsic way?

19 A Bizarre, violent actions, incoherent statements.

20 THE COURT: Some overt action?

21 THE WITNESS: Yes, that I would have to observe or
22 hear.

23 Q You mentioned, I believe, that you had occasion
24 last week to review the District Attorney's file concerning
25 this case and concerning Victor Mayo.

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DeMeo-cross

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From reading that record, can you state at this time whether prior to the trial you learned either from the records you had before you or from any other source Mr. Mayo had previously attempted to commit suicide?

A Up until Mr. Hoffman, the Attorney General, came in I had absolutely no knowledge of any matter that would indicate any mental or emotional illness on the part of this defendant.

Q And in particular no knowledge that he attempted to commit suicide?

A Absolutely not.

Q If you had known he had in fact attempted to commit suicide would you have regarded that as being relevant to the question of his competency?

A I would have paid some significance to it. I might have brought it to the attention of Judge Barshay.

Q Did you learn prior to the day of the trial from any source whatsoever that Mr. Mayo had a prior history of epilepsy?

A I have no knowledge, never had any knowledge.

Q And with respect to the epilepsy, if you had knowledge of that particular illness, would you have considered that relevant to the question of his competency?

A The mere use of the word epilepsy doesn't really

1 indicate emotional disturbance or mental disease because
2 it has different--
3

4 Q That is not my question.

5 A -- it has different degrees of intensity, as in
6 People against Higgins.

7 Q I am speaking about its relevancy to his compe-
8 tency to stand trial.

9 A I would have taken that into consideration.

10 Q Did you learn prior to the day of the trial from
11 any source that Mr. Mayo had been confined in five dif-
12 ferent institutions for more than nine of his first
13 eleven years?

14 A It is the first time I hear of it.

15 Q If you had known that fact prior to the day of
16 trial would you have regarded that as relevant to the
17 question of his competency?

18 A They are all relevant. The question is to
19 what degree.

20 Q Did you learn from any source that Mr. Mayo had
21 been diagnosed as a childhood schizophrenic with hebe-
22 phrenic tendencies?

23 A The first time I heard of it.

24 Q Again I ask if you had known at the time would
25 you have regarded that as relevant to the question of his

competency to stand trial?

A I am sure I would have.

Q Did you know from any source whatsoever prior to the date of trial he had been confined in two state hospitals for a period of over five years and that he had been treated for mental illness in those hospitals?

A No.

Q Had you known that would you have regarded that as relevant to the question of his competency?

A Relevant, yes.

Q Did you know at that time, that is, in 1960, prior to the date of the trial, that Mr. Mayo had been required to attend the Brooklyn Aftercare Clinic as an outpatient for psychiatric treatment up to the very day of the acts for which he was accused of committing the crime?

A All of this information you are telling me for the first time.

MR.MATZ: I have no further questions.

THE COURT: Anything else, Mr. Hoffman?

MR. HOFFMAN: One or two questions, your Honor.

REDIRECT EXAMINATION

BY MR. HOFFMAN:

Q Professor DeMeo, you read the trial minutes in this

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DeMeo- rec. ect

2 case, didn't you?

3 A I did.

4 Q Do you recollect from the trial minutes having
5 cross-examined the defendant?

6 A I did.

7 Q Based upon your current recollection as refreshed
8 from the trial minutes was there any indication to you during
9 cross-examination that this defendant was not understanding
10 the questions that you put to him?

11 A None whatsoever.

12 I was particularly interested this afternoon,
13 because I just read them a few moments ago, that this de-
14 fendant when he took the stand inculpated himself and ex-
15 culpated Mr. Cunningham, his co-defendant, and I was inter-
16 ested in observing the answers as to whether they were re-
17 sponsive, coherent, and I came to the conclusion they were
18 responsive and they were coherent. He knew exactly the nature
19 of the questions.

20 THE COURT: Mr. Matz, do you have any further
21 questions?

22 MR.MATZ: I have no further questions.

23 THE COURT: Thank you very much.

24 MR. HOFFMAN: On behalf of the respondent I wish
25 to offer only two more exhibits, both of which are from the

official records of the Supreme Court, New York County.

THE COURT: Has Mr. Matz seen them?

MR. MATZ: Yes.

MR. HOFFMAN: Exhibit B is the information of the second felony offense which was filed against this defendant, and Exhibit C is the court's record of proceedings in New York County, and in particular, your Honor, I would like to direct your attention to one paragraph which has been stamped on this court record.

THE COURT: This is as of what date?

MR. HOFFMAN: The heading is Sentence and under that the document says, "Part 36, May 25, 1966. Name of counsel present: David R. Rubin. Stenographer, Deborah Erlich, court reporter.

"Section 1943 penal law complied with. Defendant admits he is the same person and was so convicted as charged in said information.

"Further, defendant does not challenge any prior conviction on the ground that it was obtained in violation of constitutional rights."

(Respondent's Exhibits B and C received in evidence.

THE COURT: Do you have any further witnesses?

MR. MATZ: Yes. Before I call my one remaining

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^{Walit}
[Wali] - direct

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2 witness I would like to ask at this time whether we will
3 be permitted to submit post-trial briefs regarding the evi-
4 dence introduced.

5 THE COURT: Yes. I assume you don't want them
6 too long, and I don't want them too long, but I would like
7 to have your thoughts.

8 MR.MATZ: I would like to call as a witness on
9 rebuttal Mrs.Harriet ^{Walit} [Wali], please.

10 ...

11 H A R R I E T ^{W A L I T} [W A L I] called as a rebuttal
12 witness by the petitioner, having been first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. MATZ:

16 Q Mrs. ^{Walit} [Wali], what is your profession?

17 A Psychiatric social worker.

18 Q Where are you presently employed?

19 A With the Bureau of Child Guidance in the Board
20 of Education.

21 Q Were you employed by the Brooklyn Aftercare Clinic
22 in 1960?

23 A Yes.

24 Q In what capacity?

25 A As a social worker.

215

1
2 Q Did you have occasion while you were employed
3 at the Brooklyn Aftercare Clinic as a social worker to
4 meet with a patient named Victor Mayo?

5 A Yes.

6 Q Do you recognize Victor Mayo as being in this
7 courtroom now?

8 A I know it is Victor Mayo but I would not have
9 recognized him.

10 Q In the fall of 1971 did you have occasion to
11 review the records of the Brooklyn Aftercare Clinic con-
12 cerning Victor Mayo?

13 A Yes. You sent them to me.

14 Q Along with those records was there a picture
15 included of Victor Mayo taken in 1960?

16 A Yes.

17 Q Based on those records and the picture of Victor
18 Mayo were you able and are you able now to remember the
19 case of Victor Mayo?

20 A Yes.

21 MR. MATZ: I would like to have marked as
22 Petitioner's Exhibit 13 the records of the Brooklyn After-
23 care Clinic for Victor Mayo. They are several pages in
24 length. They are nine pages. I think they should be marked
25 as one exhibit.

xx

(Petitioner's Exhibit 13 marked for identification.)

Q Mrs. ^{Walit,} [Wali,] I show you Petitioner's Exhibit 13 and in particular direct your attention to the entry dated March 21, 1960.

Would you please read that?

A "The above-named patient and his mother" --

Q You can read it to yourself.

(Pause.)

Q There was some previous indication that the probation report states that -- the probation report compiled concerning Victor Mayo states that he was being considered for discharge from the Brooklyn Aftercare Clinic.

Keeping that factor in mind, I would like to ask you the following question.

Do you know whether Victor Mayo was under the continuous treatment of the Brooklyn Aftercare Clinic from the time he began attending the clinic in January of 1959 until this consultation on March 21, 1960?

A From what the records had indicated after reading them apparently there were sporadic contacts.

Q Did there come a time there was no contact at all?

A Yes.

Q Do you recall for how long a period of time there

was no contact-- that is, no treatment and no session?

A No. I think we really have to go over the material and see, you know, which appointments were failed and which were kept.

Q I would like to ask you to go over the material very briefly and go through the previous entry -- prior, that is, to March 21, 1960-- the last entry where there was an actual session between Victor Mayo and one of the professional members of the Brooklyn Aftercare Clinic.

A The previous one was May.

Q May of 1959, is that correct?

A Yes.

THE COURT: That is ten months before?

THE WITNESS: Right.

Q Is it correct to conclude that for a ten-month period Mr. Mayo was absent from the clinic and did not receive any treatment?

A That is correct.

Q Do you know whether he received treatment from any other source?

A Not to my knowledge. I have nothing indicated here.

Q But you do know that insofar as the Brooklyn Aftercare Clinic was concerned he was receiving no psychiatric

1 treatment during that period?

2
3 A Right. He was maintained on our status probably
4 on a lost contact and then apparently he was again located.

5 Q The entry dated Mar . 21, 1960 concludes with
6 the name Miss H.L. Tullin, apprentice psychiatric social
7 worker.

8 Are you the person who is referred to there as
9 H.L.Tullin?

10 A Yes.

11 Q Is it fair to say you compiled this entry for
12 March 21, 1960?

13 A Yes.

14 Q The entry states --

15 THE COURT: You have been married since then,
16 is that it?

17 THE WITNESS: Yes.

18 Q That was your maiden name?

19 A That's right.

20 Q The entry begins with the statement that "the
21 above named patient and his mother were seen today regard-
22 ing discharge planning."

23 Can you tell us what that statement means?

24 A What discharge planning means?

25 Q What the statement that he was seen regarding

1
2 discharge planning.

3 A Usually within one year's time from release to
4 aftercare a patient is generally considered for what we
5 call discharge planning by one year. This means that a
6 person is evaluated in terms of what his or her adjustment
7 has been outside of an institution. Very frequently this
8 involves, and most times it involved contacting the family
9 as well.

10 THE COURT: When you get to that stage are you
11 pretty sure you are going to discharge somebody or is it
12 just on a possibility that you might?

13 THE WITNESS: The evaluation-- the attempt was to
14 within one year's time make the evaluation. The decision
15 may or may not be made depending upon manifest symptoms.

16 THE COURT: Would that entry then indicate the
17 question was still open whether he would be discharged or
18 not?

19 THE WITNESS: Yes. I think that this statement
20 and another statement which had also been included from the
21 psychiatrist indicated that he wanted to see him another
22 time, which did leave it open at that point.

23 Q So is it fair to conclude then that the fact that
24 on this session of March 21, 1960, which was the last ses-
25 sion that Victor Mayo had at the Brooklyn Aftercare Clinic,

1 and which had taken place after a ten-month period in which
2 he had no sessions at all, is it fair to conclude that
3 your reference to the interview as being "regarding dis-
4 charge planning" -- that that reference does not indicate
5 that Mr. Mayo had improved enough to be released from
6 training and treatment?
7

8 A I believe a return appointment was anticipated.
9 If you want it further clarified--

10 Q No, I just ask if the fact he was being considered
11 for discharge planning meant he was healthy enough to be
12 released.

13 THE COURT: I don't want to answer for you but I
14 take it from what you have said it to mean he was healthy
15 enough for you to consider discharging. No decision
16 had been reached?

17 THE WITNESS: Right.

18 MR. MATZ: I have no further questions.

19 THE COURT: Mr. Matz, you said in questioning
20 Professor DeMeo that Mr. Mayo had remained in the care of
21 the Brooklyn Aftercare Clinic or whatever its precise name
22 is, until the day before, I think you said the crime in 1960.
23 Is that indicated in the file or were you saying that in
24 a general way?

25 MR. MATZ: If I said it I meant to say in a general

1 mdg

^{Walit}
[Walit] direct / cross

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2 way. What the case was, so far as I can understand, your
3 Honor, is that Mr. Mayo was required to attend the clinic
4 pursuant to the terms of his release from the previous state
5 mental hospital.

6 THE COURT: But the last time he attended was March
7 21?

8 MR. MATZ: Yes, about ten days before the date for
9 the offenses--

10 THE COURT: Thank you.
CROSS EXAMINATION BY MR. HOFFMAN:

11 Q Mrs. ^{Walit} [Walit], you were about to make some statement
12 about manifestations, I believe.

13 Would you clarify what you were going to say
14 about that?

15 A What I was going to say is that usually the psy-
16 chiatrists and social workers are attempting to evaluate
17 adjustment in terms of what is a patient manifesting; is
18 he showing a reasonable adjustment back in the community,
19 obtaining a job, relating well with the family, et cetera,
20 or is he, you know, quite symptomatic of certain pathologies.
21 This is one of the main areas of trying to determine whether
22 discharge is appropriate or not.

23 Q And if you had observed any manifestations of un-
24 healthy behavior, would you have noted that in these re-
25 ports?

1
2 A Well, you know, I think here I did say that he
3 showed little emotion, that although he was cooperative
4 he showed little emotion.

5 Q Would you recall approximately how long this inter-
6 view took?

7 A No. I mean, you know, it is about almost a page
8 long in dictation, as I look over it. In other words,
9 I apparently did attempt here to fill in for the time that
10 was lost to understand what had been done. You know, we
11 talk about new addresses, job, employment, a request from
12 the Magistrate's Court. I would say it took a little
13 while. If I recall, his mother was more active than he
14 was. He was quiet.

15 Q And if you believed that a patient was not ready
16 to be considered for discharge, what factors would you note
17 in the record to --

18 A Well, one thing we do is before discharging make
19 a referral with the psychiatrist, and also have a consulta-
20 tion, which was done on the following day. I mean, you
21 know, here there are two things apparent. There were in-
22 dications of adjustment, and then at times there were also
23 indications of some difficulty in the community. And also
24 the lapse of time, ten months, is a very long time and the
25 doctor did request a return appointment with him.

1 Q If it had appeared to you during this interview
2 that the person was unable to understand the import of
3 your questions, would you have noted that in this interview
4 report?

5
6 A That is an ambiguous question, especially if I
7 recall his quietness and reserve. It is very difficult.

8 THE COURT: The question is not whether you
9 noticed the reserve. The question is whether you noticed
10 anything that led you to believe he wasn't in good mental
11 health, would you have made a note of it, and perhaps I
12 think one of your earlier answers was you did make a note
13 of his apparent ^{lack} [lack] of emotion?

14 THE WITNESS: Yes, that was my initial- - in other
15 words, he wasn't violent, but he was extremely quiet and
16 withdrawn, which is indicating--

17 Q I understand what his emotional state was and I
18 know that you noted it in the report, but what I am driving
19 toward is his level of comprehension in response to what-
20 ever questions you may have posed to him.

21 A That is very difficult to really judge, anyhow,
22 in terms of such long recall, ten years ago, to be honest
23 with you.

24 Q What I meant to elicit was whether you would have
25 noted that factor in this report if you observed he was

1 incapable of understanding your questions.

2 A I think that I didnote it. Maybe not in the way
3 that you are looking for it, but here I think I did say that
4 he showed little emotion. That is an indication of --

5 THE COURT: But to be a little more specific, Mrs.
6 [Walit
7 Wali] is there any reason, after reading that report, for
8 you to believe that he didn't understand what was going
9 on at the session?

10 THE WITNESS: No, I don't believe so. I recall
11 one thing vividly, and I don't know if this relates to
12 it or not. I felt that his mother was very active and con-
13 trolling.

14 Q Mrs. [Walit
15 Wali] you state at the end of the report
16 "The patient understands that he will receive a discharge
17 appointment with the doctor as soon as there is a Thursday
18 evening appointment available and that he can contact this
19 clinic any time before this."

20 A Yes.

21 Q Do you recollect whether you wrote this on the
22 basis of a conversation that you had with this person at
23 that time?

24 A Yes, he was working at that time, as I read over
25 here, and an evening appointment -- we were open Thursday
evenings for people who were employed.

1
2 Q So you had explained to him what the schedule was?

3 A Right. In other words, I would directly explain
4 the procedure as to what would follow next, and if contact
5 was necessary before that time I could be contacted directly.

6 THE COURT: I take it when you said "The patient
7 understands" you used it in the colloquial sense that he
8 had been advised of it; you were not passing a judgment on
9 his comprehension, but on the other hand you had no reason
10 to believe he did not understand what you said?

11 THE WITNESS: Right. In other words, if he showed
12 some sense of awareness --

13 Q That is what I meant.

14 MR. ^{HOFFMAN} MATZ: No further questions.

15 THE COURT: Is that document in evidence or do
16 you want to put it in evidence?

17 MR. MATZ: No, I don't think it is necessary.

18 THE COURT: Anything further, Mr. Matz?

19 MR. MATZ: No. The petitioner rests, your Honor.

20 THE COURT: Then we will leave it within a reason -
21 able time to be worked out, you will attempt to stipulate
22 what Justice Barshay's testimony will be, and within a
23 short time after that you will send me a memorandum?

24 MR. MATZ: May I say this? I think it would be
25 useful to submit the memoranda shortly after the transcript

1
2 of this proceeding is available. I haven't requested one,
3 and I don't know when it will be ready, but within a
4 reasonable period after that.

5 THE COURT: It is in the interest of your client
6 to move along, but I have no particular schedule on it, and
7 I don't suppose Mr. Hoffman does.

8 The only thing I would like to say is if possible
9 I would like you -- let's put it this way, that the mem-
10 oranda will be received three weeks after the transcript
11 is received, and I do not wish to have answering memoranda,
12 you can hold them until the last day if you want to, but
13 in any event, just give me your direct views, not your
14 answering views.

15 MR. MATZ: Very good, your Honor.

16
17 ...
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25

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Cross</u>
Michael Washor	14	27		
Victor Mayo	31	38	42	
Richard Sallick	43	75		
^{Gerald} [Herald] P. Hecht	83	92		
Albert V. DeMeco	100	107		
Harriet ^{Walit} [Wall]	114	121		

EXHIBIT INDEX

<u>Petitioner</u>	<u>Identification</u>	<u>In: Evidence</u>
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EXHIBIT INDEX

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February 9, 1972

Asst. Atty Gen Hillel Hoffman
Room 436
80 Centre Street
New York, N. Y.

RECEIVED

FEB 10 1972

DEPT. OF LAW
NEW YORK CITY OFFICE

Dear Mr. Hoffman:

Am returning herewith list of corrections
duly made in copy to be submitted to clerk for
filing. Please notify Mr. Matz, and conform your
copies accordingly.

Murray Deutsch

Return to Mr. Hilgel Hoffman Rm 436
Inst. City 80 Center St.
N.Y.

CORRECTIONS IN TRANSCRIPT

Page/Line

- OK Cover In Index Number change "Cr." to "Civ." and add "(MEL)" at the end.
- ~~2/10~~ ~~Insert the word "it" before the word "if"~~
- ~~2/13~~ ~~"Breifly" should be spelled "briefly"~~
- ~~2/21~~ ~~Insert comma after the word "petitioner"~~
- ~~3/12~~ ~~Substitute "pleaded" for "plead"~~
- OK 4/11 Substitute "shall" for "should"
- ~~5/23~~ ~~Insert comma after the word "appeal"~~
- ~~8/16~~ ~~Insert comma after the word "that" and comma after the word "disclosure"~~
- OK 9/10 ~~THOUGH~~
Substitute the word "but" for the word "that"
- ~~12/14~~ ~~Insert comma after the name "Schweitzer" and make "amer" "action"~~
- ~~14/7~~ ~~"you" should be "your"~~
- ~~16/9~~ ~~Insert comma after the word "time"~~
- OK - 19/7 Omit the letter "q"
- OK 29/19 Substitute "condor" to "candor"
- ~~32/8~~ ~~"weud" should be "would"~~
- ~~32/17~~ ~~Insert quotation mark before the word "yesterday"~~
- OK ~~32/18~~ ~~Add the letter "t" to the name "Angus"~~
- ~~35/7~~ ~~Substitute the word "from" to the word "for"~~
- ~~35/21~~ ~~Add a comma after the word "case"~~
- ~~35/25~~ ~~Make the word "hout" "about"~~

Page/Line

- 43/11 Make "11:15" instead of "1:15"
- ~~44/18 Make "graduated" instead of "garduated"~~
- 47/~~18~~ 18 Insert the words "the court" in capital
- 48/16 Substitute the letter "d" for "g" in the doctor's name making it "Doody" instead of "Goody"
- 49/4 Make the first word "develop"
- 54/10 Last word should be "thick"
- 55/23 The second word should be "ego"
- 61/10 Insert comma after the word "is" and after the word "ego"
- 63/20 Where the letter "w" appears insert the word "with" instead of "w"
- ~~64/8 Insert a comma after the word "syndrome"~~
- 74/18 Insert the word "~~where~~^{IF}" before the word "~~and~~^{VICTORY}"
- ~~77/7 "potentialities" insert the letter "i" between the letter "l" and "t"~~
- 83/6 The name "Herald" should be "Jerald"
- 84/17, 18 The name "La Vallee" should be "Levy". This error will continue to be noted in several cases and I will simply say "La Vallee" should be "Levy"
- Edward Levy*
- 84/20 "La Vallee" should be "Levy"
- 84/22 "La Vallee" should be "Levy"
- 85/7 "La Vallee" should be "Levy"
- 85/9 "La Vallee" should be "Levy"
- 85/15 "La Vallee" should be "Levy"
- 85/20 "La Vallee" should be "Levy"

Page/Line

OK 86/12 "La Vallee" should be "Levy"
 OK 86/14 "La Vallee" should be "Levy"
 89/15 "Abberation" should be spelled "aberration"
 OK { 91/14 "La Vallee" should be "Levy"
 91/16 " " "
 90/21 " " "
 OK 91/11 The word "mans" should be "means"
 OK 91/22 The Name "Dolan" should be "Thulin"
 91/23 The quotation mark should be omitted and inserted
 at the end of line 25.
 OK { 92/8 "La Vallee" should be "Levy"
 92/25 " " "
 93/4 " " "
 93/14 " " "
 94/3 " " "
 OK 94/7 The word "too" should be "took"
 OK 94/11 "La Vallee" should be "Levy"
 OK 95/15 The word "take" should be "taken"
 OK 95/20 "La Vallee" should be "Levy"
 OK 96/3 " " "
 OK 96/7 The word "of" should be "or"
 OK 96/17 "La Vallee" should be "Levy"
 OK 100/25 "Psychology" should be stricken and the word
 "Law" should be inserted
 OK 107/17 The word "was" should be "as"

Page/Line

~~108/23~~ ~~The second word should be "mentioned"~~

~~110/25~~ ~~"Qustion" should be "question"~~

114/9 "Wali" should be "Walit". This error will be repeated.

114/11 "Wali" should be "Walit"

114/16 " " "

116/4 " " "

~~118/9~~ ~~"Thulin" should be spelled with only one "l"~~

121/10 Insert in capital letters "Cross-examination by
Mr. Hoffman" and at the top of page add after
"direct" a "/cross"
Carry thru to p. 125

~~121/23~~ ~~The word "manifestions" should be "manifestations"~~

123/13 The word "lock" should be "lack"

124/7 "Wali" should be "Walit"

124/14 " " "

125/14 Substitute "Mr. ^{Hoffman} ~~Matz~~" for "Mr. Hoffman"

126/ Note that I must speak to Hoffman as to asked
these questions

127/7 "Herald" should be "Gerald"

127/9 "Wali" should be "Walit" and also number 121 should
be inserted under column for "Cross" on line 9 of
page 127

RE: Victor Mayo, born 6/15/42

March 19, 1953

General Statement of Problem:

Victor came to the Astor Home by transfer from St. Dominic's in Elauvelt, New York. He was accepted following the recommendation of the psychiatric social worker of C. C. G. I. His case was discussed at our Intake Meeting and accepted on the basis of his previous psychiatric and psychological examinations done in 1951. It is said that "he is the victim of a disorganized home situation in which he never enjoyed a real feeling of belonging. He has been suffering rejection since he was a small boy, and, apparently, was unwanted. He has a tendency to slip into a world of his own, and will need consistent, persistent handling to help him to adjust. He should be assigned tasks with which there is some responsibility and praise for what he does well".

Victor was born on 6/15/42 in Brooklyn, New York. He is the youngest of five children, and was born several months after the death of his father. Victor went to St. Dominic's on 9/8/46 by transfer from the Convent of Mercy, Brooklyn so he could be with his older siblings. Practically this child's whole life has been spent in institutions. As a baby, he was just left at the King's County Hospital long after he was ready to leave the hospital. He was remanded to New York Foundling by the Brooklyn Court on a "neglect" petition from 5/43 to 9/43, and was again committed by Court to the Angel Guardian Home in Brooklyn on 4/27/44 from which he was transferred to Convent of Mercy on 3/15/45, and it is from there that he was transferred to Elauvelt. The immediate cause of his transfer from St. Dominic's to the Astor Home was "his compulsive actions, stealing, lying, general destructiveness, inability to control his actions and emotional flatness".

Family History:

Father died an accidental death on his job a few months before Victor's birth.

The mother and three older siblings are living in Brooklyn in a four-room apartment. This apartment is adequately furnished and well-kept. However, these three children had previously also been placed at Elauvelt, and for several years after their placement, this mother showed only a little interest in them, and visits were very infrequent. However, she gradually did begin to show interest, and in 1950, she was able to plan for the two older siblings. When William graduated from 8th Grade in June, 1951, the home was ready, and he and Rosemarie were discharged to their mother. In November, 1951, Barbara also was discharged to her mother. The mother gave up her employment and remained at home to supervise the children, and is being supported by Public Assistance. William has discontinued attendance at school, and is now employed. Both girls are making good adjustments. It is not possible, at the present time, to work with Mrs. Mayo in terms of having the younger children return home. However this may be possible at a later date if she is able to secure a larger apartment. Both Victor and Joseph have gone home for occasional week-ends, and the boys were last in the home of their mother during the Christmas holidays for a three-day period.

PSYCHIATRIC EXAMINATION

RE: MAYO, VICTOR - born 6/15/42

March 19, 1953

This examination was carried out by the undersigned, following 10-12 interviews conducted in the office and from notes given by the psychiatric nurse and observations of the psychiatric social worker.

Victor is a fairly good-looking child with regular features, of normal development, athletic type and rather hyper-active and restless. He has a facial tic characterized by frequent blinking of his eyes and twitching of the facial muscles. During these several interviews, he always came willingly into the office, was never resistive and never refused to cooperate. A superficial rapport was successfully established from the beginning, and persisted throughout all the examination, but the boy never was deeply reached and contact was only superficial. In the office, Victor was always able to control his motor activity. However, his behavior and activity during his stay at the Astor Home are in direct contrast with his behavior in the office. Victor is unable to concentrate, and extremely distractible. He is out of contact most of the time, vague, superficial and flat. His attention is superficial and he is able to give it only for a brief period. He is rather confused about the whereabouts of this place, and frequently forgets about the time, place and person. He never could give a reliable account of himself or of his activity. He finds it extremely hard to think for himself, and doesn't show any capacity for abstract thinking. He is not interested in reading or attending school, and in spite of being of average intelligence, his general knowledge is very poor. During his stay here, he has constantly shown evidence of absolute lack of judgment and of having no common sense at all. He never shows any spontaneous association of ideas, and always limits himself to answering when asked to. He is hesitant and irrelevant. There is strong evidence of retardation and incoherence. There is no thought content whatsoever. He doesn't show any prominent pre-occupations, no fantasy life, and he is unable to discuss any of his dreams. He just says, "I don't have any". There were no evidences of obsessions or fixed ideas. He is called by his friends "empty head". His affective processes are characterized by emotional flatness, superficiality, and vagueness. He is dull, cold and cannot be reached. He doesn't show any personal initiative, and he acts only impulsively after suggestions from others. However, in spite of his coldness and apathy, one senses a vague, underlying apprehension and depression. He frequently expressed his behavior by overt defiance, impulsive and destructive tendencies.

From his record, it appears that on 2/3/53 he jumped out a second story window onto a tree and climbed down to look for a quarter that another boy lost. On 2/6/53, he broke several windows for no apparent reason. On 2/9/53, he broke into the staff cottage and broke 23 windows and stole money and belongings from the counsellors' rooms. The day after he completed the task by breaking the metal frames around the broken windows. On 2/10/53, while in the treatment room because of inability to restrain him, he broke everything he could. On 2/14/53 he went down the fire escape and threw a stone at the counsellor; broke several windows. He was restless and needed constant supervision. On 2/15, 2/17, 2/22, he showed the same destructive behavior directed against windows and everything he could get his hands on. He becomes very angry when a request is denied, and he breaks everything in sight when other children urge him to do it. They know that Victor will do anything they tell him, and they use him for their own purposes.

238 On 3/3/53, while playing on the fire escape, he crushed his fingers. He cried because of the pain, but cooperated well with the treatment. On 3/4/53, he had what appeared to be an epileptic fit. Victor's parents are both from New York City.

Victor gave a loud cry which lasted a few seconds. He then fell backwards. He did not respond when called. His pupils were dilated, and his eyes were open and fixed as if he were looking straight ahead. He had severe twitching of legs, arms and body which lasted from 30-45 seconds. He was slightly cyanotic. There was no incontinence. After regaining consciousness, he said, 'my hand, something happened to my hand'. When he tried to get up, he was unsteady on his feet, and could not stand up on them." He finally recovered.

During his stay here, his expressive behavior has been one of impulsive actions, destructiveness, temerarious actions, absolute lack of motor control. His epileptic fit (no previous history in the record) points to a possible organic lesion.

Victor's functioning in relation to himself is extremely poor. He "doesn't know anything about himself", about his personality, and he has not based his ego-identity on any other person. He shifts from one role to another with bewildering frequency and rapidity. At one moment, he is superficial and cooperative, and at the next, extremely restless, resistive and unable to accept any suggestions. He is a highly narcissistic individual relating to himself anything that happens around him. He immediately responds to acceptance, but always in a superficial manner. He is never enthusiastic about anything, and his mood is mostly flat and apathetic. He has not established any ideal figure for himself. He does not identify with anybody, and he has never made even the vaguest attempt to have a personal standard of value. He is an extremely immature child with no evidence of any super-ego strength. There is no ego-integration and no self-control whatsoever. He would smash windows in your presence or destroy anything in sight without developing any guilt feelings. His actions are extremely impulsive. He can't complete any task assigned to him, and if forced to it, he falls into aimless, destructive behavior. He is unable to accept any limitation, and his destructiveness is endless. His ability to relate to others is poorly developed and only superficial. He is, at any rate, passive and dependent, and when not crossed, does what you tell him if your requests are not too complicated, and you can lead him into a certain organized activity. However, he requires constant supervision. His relationship is always shallow and unsubstantial.

His relationship to things is a carefree one. He is not attached to any possession of his own or to the possessions of others. He is inconsistent, and shows no interest in work or in play. His religious interest is superficial and not felt. His fear of God is of the same superficial and vague level.

He reacts to situations by passive acceptance when they are mild, and by hyper-active, pointless, destructive behavior and aimless, overt behavior when they are serious. Each time he was crossed or deprived or punished, he became more destructive and irritated, and this, to the extent that our staff has recognized as of no therapeutic value any form of deprivation applied to Victor. We feel, and the records show, that if Victor is submitted to severe stress, he could react by serious misdeeds such as fire-setting, stealing, persistent unmanageableness.

During his stay here, he had many such episodes, and the potentiality of suicidal or homicidal attempts should be taken into consideration. His behavior, as observed for a two-months' period, points to an ego-disequilibrium characterized by an erratic and disorganized behavior with frequent incoherent, silly and bizarre reactions. He is frequently confused, bewildered and disoriented. No delusional content has been registered, no hallucinations, no obsessions or fixed ideas. We feel that Victor is affected by and has a ten-

dency to a permanent form of ego-rupture characterized by episodes of aggravation during which he becomes panicky, wildly excited, incoherent, and perhaps suicidal. (though he has never attempted suicide) During such episodes, he loses his self-control, throwing things about and refusing to cooperate in any way. The principle characteristic is the absence of any anxiety reaction, and this, even after the most serious offense. He represses his anxiety feelings into his unconscious, and doesn't show, consequently, any fear or apprehension. As a result of this lack of fear, he is temerarious to the point of placing his life in danger as he did when he jumped from the second floor window onto a tree. His constant repression makes him act and behave as if he had no feelings, and this lack of feeling, is one of the cardinal symptoms of his personality.

DIAGNOSIS:

Psychiatric Diagnosis: "Childhood Schizophrenia - Escephrenic tendencies".

Personality Type: "Psychotic Personality".

Unclassified Symptomatology: Convulsive seizure.

E. G. Piana, M. D.,
Clinical Director

EGP:smj

DIAGNOSTIC SYNTHESIS

VICTOR MAYO, born 6/15/42

March 19, 1953

The Heredo-Congenital Nucleus of Personality:

Father died accidentally. Nothing is known about his family.
Mother is a severely maladjusted person--alcoholic, sexually promiscuous,
mingling with prostitutes. She has been arrested several times. (no
known reason)

Developmental History:

Patient is an immature child suffering from early developmental maladjustment.
He is an unwanted child suffering from parental rejection, and who has spent
most of his life in the cold, impersonal, disinterested atmosphere of institutions.
He has not been able to develop any capacity for good inter-personal relation-
ships because of his extremely insecure background, his feelings of unwantedness
and unlovedness.

Personality Structure:

Victor developed into a flat, impersonal, cold type of individual irresponsive
to any warmth or love. He displays a psychotic type of personality.

Particular Stress and Traumata:

Sudden death of father before Victor's birth; reaction of mother to death of
husband; overt rejection by mother; several different placements.

Precipitative Evidence:

None may be considered to have precipitated illness.

Therapeutic Response:

No progress has been registered to the present time.

DIAGNOSTIC SUMMARY:

Psychiatric Diagnosis: "Childhood Schizophrenia - hebephrenic ten-
dencies".

Personality Type: "Psychotic Personality".

Unclassified Symptomatology: One definite convulsive seizure.

Emil G. Piana, M. D.,
Clinical Director

ECP:suj

ENTERED
12/8/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

39009
Copy

UNITED STATES OF AMERICA, ex. rel.
VICTOR MAYO,

Petitioner,

70 Civ. 2202

-against-

J. EDWIN LA VALLEE, SUPERINTENDENT
OF THE CLINTON CORRECTIONAL FACILITY,

OPINION

Respondent.

APPEARANCES:

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Attorney for Petitioner

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Attorney for Respondent

Of Counsel: HILLEL HOFFMAN, ESQ.
Assistant Attorney General

FILED
U.S. DISTRICT COURT
DEC 9 11 09 AM '72
S.D. OF N.Y.

LASKER, D.J.

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. He is now serving a prison term of 15 to 25 years having been sentenced as a second offender upon conviction by his guilty plea to first degree manslaughter in 1966. He does not attack the manslaughter conviction, but challenges his 1960 conviction for third degree robbery and petty larceny upon which his present sentence was predicated. He asks that his 1960 conviction be vacated and that he be resentenced as a first offender for the 1966 manslaughter.

His conviction in 1960 followed a trial before a Judge without a jury in the former Kings County Court. No appeal was taken from that conviction until the Spring of 1970, when petitioner obtained a ruling that he had not been advised of his right to appeal and had not known of his right to appeal; he was resentedenced nunc pro tunc in 1970 and filed a notice of appeal which is currently pending (see Transcript of Hearing, January 17, 1972, at p. 5, and Exhibit 8 at Tr. 13). Although he did not attack his conviction by appeal prior to resentence, he did bring on an application for a writ of error coram nobis in 1967. This

application was denied following a brief hearing, and the denial affirmed by the Appellate Division, Second Department on June 30, 1969 (32 App. Div. 2d 893). Leave to appeal to the Court of Appeals was denied on September 15, 1969.

Despite the pendency of petitioner's state appeal, the issues pressed at his coram nobis proceeding are the same as here. Accordingly, he has exhausted his state remedies. The instant petition was originally brought in the Eastern District of New York. Jurisdiction was noted and the application transferred under provision of 28 U.S.C. 2241 to this Court by order of Chief Judge Mishler (No. 69-C-1529, E.D.N.Y., filed May 26, 1970). Finding serious questions of law to be raised here, the court invited A. Howard Metz, Esq. of the Bar of this Court, to serve as counsel to the petitioner. A hearing was held January 17, 1972, pursuant to Townsend v. Sain, 372 U.S. 293 (1963), and extensive memoranda filed by petitioner and respondent.

Petitioner raises several challenges to his 1960 conviction: (1) Petitioner was incompetent to stand trial in 1960 because of his mental illness, as evidenced by a history of institutionalizations for 15 of his 17 years of age. (2) Petitioner's inability to dis-

close basic facts to his attorney rendered him incompetent to stand trial in 1960. More specifically, petitioner urges that his incompetence is derived from (a) his schizophrenic and schizoid personality, (b) his organic brain damage and symptoms of epilepsy and convulsive seizures, and his intellectual impairment with an I.Q. measurement of 80, a "mental deficiency" or "retarded" rating. Petitioner urges that he has never waived his right to assert these grounds by his later guilty plea to manslaughter or otherwise.

FACTS

Petitioner was diagnosed as mentally ill while still a young child. He has been committed to two different New York State mental hospitals, having been certified as "mentally ill" by Order of Justice Martuscello of the State Supreme Court (Exhibit 9d) and confined to Rockland State Mental Hospital for five years. He was released from mental hospitals at the age of 17 and placed under supervision of the Brooklyn Aftercare Clinic. The Aftercare Clinic's records reveal that petitioner was last seen on March 21, 1960, not having appeared at the Clinic for ten months previously. He was called in to discuss his

discharge from Aftercare. At that meeting the apprentice psychiatric social worker who interviewed petitioner noted that he was quiet and withdrawn although cooperative and there was no reason to believe that petitioner did not understand the session (Tr. pp. 114-125).

What the Aftercare Clinic had observed appears representative of what petitioner's counsel termed "The central theme running throughout petitioner's documented history ... his background of utter deprivation made him remote, inarticulate and inaccessible." (Petitioner's Post-Hearing Memorandum, p. 4) When petitioner was ten years old he was diagnosed as suffering from "childhood schizophrenia" with possible hebephrenic tendencies noted. (Exhibit 9c). Nearly nine weeks after the sentence for his robbery conviction in 1960, petitioner was diagnosed as a "schizoid personality," (Exhibit 9g) by the Associate Clinical Psychiatrist of the Elmira Reception Center. The Elmira Report also succinctly stated petitioner's past:

"There was some talk of brain damage, but there has been no evidence of it at any time, nor does examination at this time given [sic] evidence of central nervous system pathology. On the other hand he has been severely rejected. The father died before inmate's birth. The mother abandoned,

apparently herself unstable, and inmate has lived his life without any close parental-child relationships. He has become completely withdrawn and presents all the earmarks at this time of the schizoid personality. There is no evidence, however, of an active psychosis."

There appears no doubt that petitioner suffers from schizophrenia. To what extent the childhood evidence of hebephrenic tendencies remain appears uncertain, although by 1960 the repeated psychiatric examinations established the schizophrenia without finding the hebephrenic tendencies manifest. Petitioner's expert at the Hearing, Dr. Richard Sallick, here testified that although schizophrenia was considered a permanent affliction, "it could clearly wax and wane." (Tr. at 60). In clarifying the possible fluctuations, Dr. Sallick stated, "During periods of stability a person with a schizophrenic illness can very often maintain a fairly reasonable and level pattern of behavior. Then if you add some additional stress you begin to see more symptoms.- In addition, there is also a question with a schizophrenic illness of whether or not it does not have some pattern of its own entirely unrelated to external stimuli." (Tr. at 79).

Dr. Sallick further stated that a person with

a schizoid personality or childhood schizophrenia would have enough mental presence and understanding of what was going on in a trial to be able to take the witness stand, as petitioner did in this case. (Tr. 79-80). Such a person would "be oriented" and "know grossly what was happening." He would not suffer from delusions or be disoriented (Tr. 80). In a period of apparent normality, a person such as petitioner can understand facts and give logical responses to questions, although "when it calls for a personal kind of initiative, this might very well be lacking." (Tr. at 81). In discussing petitioner's ability to function competently, Dr. Sallick observed that "if you don't look for something you often don't find it. In terms of a person with schizophrenic illness -- he can seem quite normal at times." (Tr. at 80).

In addition to petitioner's mental illness, it has been established that his general intelligence quotient (I.Q.) is 80 on the Webster Intelligence Scale for Children (see Exhibit 9a). This level is considered in the range of "retarded", although such a person is "capable of understanding [that] he committed a crime" and is able to understand "legal proceedings." (Tr. at 76). The record indicates that petitioner has had a

hobby of making model airplanes from balsa wood kits and presently enjoys reading Greek mythology while in prison where he serves as mess hall captain. (Exhibit 9e and Tr. at 41).

During some of petitioner's childhood institutionalizations, there is some suggestion that he may have suffered organic brain damage. It does not appear that these symptoms have been thoroughly examined.

Petitioner's condition at the time of his 1960 trial is, therefore, established to be one of limited intellectual capacity afflicted by schizophrenia which appeared fairly stable during the year in question.

This factual determination is supported also by petitioner's demeanor at trial. He evidenced no signs of incompetence apparent to the Judge, Prosecutor or his own attorney. His attorney recalls that petitioner was quiet and that "conversations were at a minimum." (Tr. at 16). Petitioner did take the stand in his defense and discuss with his attorney the importance of telling the truth. Petitioner remembers testifying and telling the Judge about the robbery. He admits knowing that he was charged with a crime and that he could go to jail.

Petitioner's demeanor at trial and thereafter

was such that the need for questioning his competency never arose. To be sure the Judge and all counsel now properly observe that had they known of petitioner's mental illness and his past institutionalizations they would have sought a psychiatric examination at the time of trial in order to eliminate any possible question of competence. In the examination of petitioner by a probation officer after the trial, no evidence of any inability to understand or to communicate was observed. The Probation Report noted petitioner's history of mental illness (Exhibit 9e); in describing petitioner's character, the probation officer stated that "He makes a rather dull impression but seems to understand the implications of his offense and could discuss it with some degree of intelligence, although appearing almost indifferent. His being below average in intelligence is corroborated by his having been in ungraded classes at school. The defendant's emotional flatness has been a characteristic since childhood. Yet he verbalized that he regrets the offense and does not know why he did it." The probation officer checked with the Brooklyn Aftercare Clinic and found that petitioner's "progress was considered as good up until the time of his crime arrest. The Aftercare division was even

considering his discharge."

Moreover, petitioner's attorney noticed no difficulty in his client's understanding. Petitioner did consult with counsel on several issues including possible disposition of the charges by a guilty plea. It was not until sentencing that petitioner's lawyer learned of his client's record of institutionalizations and mental history. He stated for the record that petitioner had been committed by his family to Rockland State Hospital and testified that he learned this fact either from petitioner's Mother or the Court through the Probation Report (Tr. at 24-25). He stated also that having been admitted to practice only a few months at the time of the trial, he did not have the trial experience to make a routine check of petitioner's mental history in hopes of turning up some evidence which might be used in petitioner's defense. Despite his newness to practice, petitioner's lawyer did discuss the case with his father, an experienced attorney.

Finally, while petitioner appears to have understood the gross situation in 1960, that he was charged with a crime, had the right to a trial and that a jail term faced him upon conviction, he apparently did not

understand the situation in full. The fact that he did not know of his right to appeal has already resulted in his resentencing nunc pro tunc. On the stand at his hearing, more than a decade after the trial, petitioner stated that he did not know that he would help his defense by telling his attorney of his mental history, that he did not know that a criminal trial "was not supposed to be held if the defendant ... did not truly understand what it is all about." (Tr. at 35), and that he did not understand "that a criminal trial was not supposed to lead to the punishment of someone who was not legally responsible for the acts he was accused of committing."

DISCUSSION

The test of petitioner's competence in 1960 is "whether he [had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has [had] a rational as well as a factual understanding of the proceedings."

Dusky v. United States, 362 U.S. 402 (1960). Petitioner has the burden of establishing that he did not.

Johnson v. Zerbst, 304 U.S. 458, 468-9 (1938); United States ex rel. Schuster v. Herold, 410 F. 2d 1071, 1085 (2d Cir. 1969); cert. denied 396 U.S. 847 (1969).

The fact of petitioner's uncontested mental illness and limited intelligence does not automatically render him incompetent to stand trial. United States v. Adams, 297 F. Supp. 596, 597 (S.D.N.Y. 1969). We must weigh the facts of record to decide whether petitioner's ability to consult with his attorney and his rational understanding of the charges and proceedings were sufficient.

Although it is alarming that a man of petitioner's mental and physical problems should go through an entire criminal trial without his difficulties even once being noticed, we cannot say that petitioner has clearly met his burden under law on this application. He did choose to go to trial and chose to testify; he understood that he could plead guilty and that jail was a likely punishment if he was convicted. Although his waiver of a jury trial was not explored fully in the proceedings here, he did waive that right and does not appear to challenge that waiver now.

The core question which suggests incompetency was petitioner's silence regarding his past institutionalizations and mental illness. His mental condition concealed itself from the untrained eye. His uncommunicativeness cloaked the range and depth of whatever

understanding his limited intelligence permitted. To make a finding 12 years after that fact that petitioner either understood or did not understand that he had possible defenses based on his mental illness is most difficult. To know whether he adequately understood what his criminal trial was all about is likewise fraught with difficulty.

When asked, "Can you state how a person who is afflicted with schizoid personality, how that condition affects such a person's ability to consult with other people and specifically to consult with an attorney?", Dr. Richard Sallick stated that:

"I think that if you have a person who is -- who tends to be extremely withdrawn, to live much of his life within his own mind or imagination, to have difficulty expressing feelings or acting effectively on his own -- I don't want to say acting effectively on his own behalf -- but who has difficulty acting aggressively, and here I think the term 'aggressive' means not just destructively but also aggressive as opposed to passive -- I think a person who has all of these characteristics is going to be a very difficult person to communicate with, to explain things to, and to obtain cooperation from." (Tr. at 73-74).

Further queries whether, based on petitioner's mental history, he could be considered to have "had a rational and not just a factual understanding of the crime proceedings against

him," elicited this response:

"I think if rational means understanding the whole picture of the whole situation, and it means taking into account what other alternatives there are, what he could possibly do in his own interest, I think if rational means that that would be highly unlikely that he had that kind of a rational awareness of the big picture of what was going on with him." (Tr. at 74-5).

Certainly petitioner appeared normal to those in contact with him. He generally understood what he was charged with and knew he could defend himself in hopes of securing an acquittal. Against this appearance of sufficient capacity to consult rationally with his attorney and comprehend rationally the criminal proceedings, are the inferences drawn from his silence that he (1) either was acting sufficiently normal despite his schizophrenia that it never occurred to him that his mental illness was relevant because, in fact, he knew he was sufficiently competent, or (2) he did not know that his mental history afforded him a possible defense, or (3) even if he knew, he was under such mental inhibition that he could not convey the facts of his mental illness to his attorney.

The issue before us narrows itself to whether petitioner's silence about his mental history vitiates the other evidence of his then "present ability" to

would evidence competence. The second would not violate the Dusky test because what petitioner knew here was not relevant; it was up to his lawyer to explore the defenses and his lawyer saw no basis to press a mental defense. The crime indicated no evidence of mental aberration and the evidence at trial raised none of the "bona fide doubt" which would require the court to hold a competency inquiry under Pate v. Robinson, 383 U.S. 375 (383) (1966). Moreover, as was stated in United States v. Kendrick, 331 F. 2d 110 (116, Concurrence of Chief Judge Sobeloff) (4th Cir. 1964),

"If a lawyer fails to recognize his client's mental deficiencies, no fair-minded person would say that this necessarily involves faithlessness or negligence. It cannot be expected that the lawyer, who is a layman in psychiatric matters, will always appreciate his client's mental limitations."

The possibility that the third inference is correct is disturbing. It appears that petitioner had sufficient capacity to confer with counsel in all aspects of his defense except this one possibility. Among the purposes of incompetency law is the fundamental policy that a man be able to inform his attorney of all facts relevant to his defense. Petitioner had the capacity to tell a probation officer immediately after his trial of his mental illness. It is certainly possible that

consult his lawyer and rational understand the proceedings.

On balance we reluctantly resolve the issue against petitioner.

"Incompetency must be a relative judgment which takes into account the average level of ability of criminal defendants. Many defendants lack the intelligence or the legal sophistication to participate actively in the conduct of their own defense. ... The standard of rational understanding emphasized in Dusky must be taken to mean no more than that the defendant be able to confer coherently with counsel and have some appreciation of the significance of the proceeding and his involvement in it. Many defendants who have some intellectual or physical handicap or emotional disturbance preventing them from functioning at their normal level of effectiveness can still meet such a standard. The question is one of degree; the purpose of the law is not to attempt to compensate all the inevitable disparities in innate abilities among defendants, but to identify those instances where the purposes of incompetency law are most directly relevant." COMMENT, "Incompetency to Stand Trial," 81 HARV. L. REV. 454 at 459 (1967).

Petitioner has failed to meet his burden of demonstrating by a preponderance of the evidence that in 1960 he did not meet the Dusky test. Of the three possible inferences to be drawn from petitioner's silence about his mental history, only the third could vitiate the other indices of competence under Dusky. The first

his schizophrenia so inhibited him before trial, a time of some stress, that he was unable to take the initiative and volunteer the information. Unfortunately, we are not allowed to rest on possibilities even when supported by some evidence. We are constrained to hold that a preponderance of the evidence does not support the third inference, however likely it may be in the abstract.

Accordingly, the application for the writ must be denied. Since Pate v. Robinson, supra, the bar and bench have been alerted to the high degree of care required as to the examination of competency where the slightest evidence suggests its absence. The instant case gives additional support for the wisdom and need of such an examination. It is unfortunate that a thorough inquiry here waited more than a decade. We cannot say whether an inquiry in 1960 would have resulted differently; the passage of time has made petitioner's burden all the more difficult to sustain and it makes our ruling that it has not been sustained a hard one. There is, however, the public interest in a limit to collateral attacks on remote convictions. The finality of criminal convictions should not be lightly tampered with.

In concluding, we note the State's contention that petitioner waived his right to challenge his competency by pleading guilty to his manslaughter charges. Beyond the classic mandate of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), that courts will not presume acquiescence in the waiver of fundamental constitutional rights, there is the compelling reality that an incompetent cannot have waived: his mental infirmity would negate intention and awareness. In determining whether a knowing waiver has been made the possibility of mental infirmity must be given greater weight than the procedural and formalistic devices such as existed here when, on his second guilty plea petitioner, tho allegedly advised that a failure on his part to challenge a prior conviction would waive its unconstitutionality, failed to make such a challenge.

Accordingly, we find no waiver; but the petition is denied for the reasons stated earlier in this Memorandum.

There is probable cause for appeal pursuant to Title 28, U.S. Code, §2253. Permission is granted to the petitioner to proceed in forma pauperis in respect to any appeal that may be taken.

We commend counsel for the highly professional and constructive work both have contributed. We

especially express our appreciation to A. Howard Matz
for his diligent and exhaustively thorough representa-
tion of petitioner.

Petition denied.

It is so ordered.

Dated: New York, New York
December 6th, 1972.

MORRIS E. LASKER
U.S.D.J.

100.202

COPY

ENTERED
8/24/73

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
VICTOR MAYO,

Petitioner,

-against-

J. EDWIN LAVALLEE, Superintendent of
Clinton Correctional Facility,

Respondent.

APPEARANCES:

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70 Civ. 2202
#39784

MEMORANDUM
OPINION

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
24 4 54 PM '73

LASKER, D.J. . .

After an evidentiary hearing, by Opinion dated December 8, 1972, we denied Victor Mayo's petition for a writ of habeas corpus. Mayo alleged that his 1960 conviction for third degree robbery and petty larceny was invalid because (1) he was incompetent to stand trial on account of mental defect and (2) his very mental illness prevented him from disclosing its existence to his counsel, thereby depriving him of an absolute defense. We held that Mayo had failed to meet the burden of proving these allegations by a preponderance of the evidence.

Thereafter Mayo moved timely for an order (1) vacating our Order of December 8, 1972, or, in the alternative, (2) amending the Opinion of that date.

We have heard oral argument, studied the excellent written material submitted by counsel in relation to the motion and reread and studied the transcript of the hearing, and conclude that the motion should be denied.

Mayo's argument proceeds on two theories (1) that the premises of our Opinion are incorrect and (2) that the transcript does not support our findings of fact. As to the first contention, we conclude that,

although Mayo has correctly analyzed the major premises of the Opinion, his argument does not disprove their validity but rather expresses, in a conclusory manner, his disagreement with them. For example, Mayo's memorandum states (pp. 2-3):

"Premise No. 1: In 1960 petitioner gave the

'appearance of sufficient capacity to consult rationally with his attorney and comprehend rationally the criminal proceedings. * * *.'
[Opinion, page 13.]

Petitioner's Contention: The evidence does not establish that he gave even the 'appearance' of being able to consult rationally or comprehend with rational understanding.

* * *

Premise No. 4: Petitioner did not meet his burden of proof that his silence resulted from such 'mental inhibition.' [Opinion, page 14.]

Petitioner's Contention: He disagrees."

As to the findings of fact, Mayo's brief juxtaposes a long series of extracts from the transcript in support of his allegations against a significantly shorter series of items derived from the Opinion, and argues that the numerical disparity compels the conclusion that the evidence does preponderate in his favor. We cannot agree that the visual disparity thus created fairly represents the totality of the evidence.

In any event, evidence is, of course, not weighed solely in terms of quantity of facts, but in the meaning and weight of the facts. Of course, reasonable men can disagree as to the weight to be accorded, and the conclusion to be drawn from the facts, and such disagreement may be possible in Mayo's case. Nevertheless, although we bear in mind Mayo's contention and the poignant history which he presents, we are not persuaded on a reading of the transcript that our Opinion should be vacated or amended.

During the course of consideration of the motion, Mayo's counsel has brought to our attention two New York cases in support of his position: People v. Bangert, 22 N.Y. (2d) 799 (1968), in which the Court of Appeals held that where a sentencing judge learned from a pre-sentence report -- as was the case here -- that the defendant had a prior history of mental illness, the court

"was bound to make some inquiry into defendant's mental condition at the time of sentencing, whether or not counsel raised the issue."

and People v. Hudson, 19 N.Y. (2d) 137, 139 (1967) applying the Bangert rule retroactively. No such inquiry was made in Mayo's case at the time of sentencing. The defendant does not dispute the

characterization of these cases but answers that the remedy for the failure to conduct the required inquiry is to afford the defendant a subsequent hearing on the issue, and that Mayo was granted this right at the Coram Nobis hearing in 1967. Mayo rejoins that the Coram Nobis hearing was not "full, fair and adequate" within the meaning of 28 U.S.C. §2254(d)(6). Whatever the merits of the respective positions, a full, fair and adequate hearing as to Mayo's entire history of mental illness has now been held in this court, thus curing the failure to abide by the rule of Bangert.

Mayo has called to our attention an error in our Opinion which requires correction. On page 1 we stated that Mayo was resentenced nunc pro tunc in 1970. Resentencing actually occurred January 4, 1971, and his notice of appeal was filed January 13, 1971.

We regret the delay in issuance of this Memorandum which was occasioned, out of respect for the seriousness to Mayo of this proceeding, by a thorough review of the case.

We again commend Mayo's court appointed counsel for the quality of the representation he has afforded his client.

The motion is denied.

It is so ordered.

Dated: New York, New York
August 23rd, 1973.

MORRIS E. LASKER

U.S.D.J.



du

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

STATE OF NEW YORK
DEPARTMENT OF LAW

STATE OFFICE BUILDING
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NEW YORK, N.Y. 10013
188-3289
TELEPHONE:

February 5, 1973

Re: Mayo v. LaVallee

Hon. Morris E. Lasker
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Dear Judge Lasker:

I have examined the cases cited by Mr. Matz in his letter of January 20, 1973, and I agree that under People v. Bangert, 22 N.Y. 2d 799 (1968), a trial court has an obligation to make some inquiry into a defendant's mental condition at the time of sentencing, when it appears in a pre-sentence report that a defendant has a history of mental illness. I also agree that People v. Hudson, 19 N.Y. 2d 137 (1967), appears to give retroactive application to Pate v. Robinson, 383 U.S. 375 (1965), to the extent that a New York defendant who is raising a sanity claim, has a right to a plenary hearing, but not a new trial, on the issue of his sanity, before a judge other than the trial judge.

However, as Your Honor will note from these decisions, and from the cases cited in People v. Bangert (see People v. Boundy, 10 N.Y. 2d 518 [1962], and People v. Sprague, 11 N.Y. 2d 951 [1962]), the proper remedy under New York law for the failure of a trial court to inquire into sanity at the time of trial, is to afford the defendant a subsequent hearing on this issue. This is precisely what the state court did in the instant case when it granted petitioner a coram nobis hearing before Justice Damiani in 1967 (see Minutes of coram nobis hearing, petitioner's exhibit 6). Although, petitioner may argue that the issues concerning his sanity were not presented as fully at that proceeding as they were in the instant proceeding, this was not the fault of the New York courts, which afforded petitioner an opportunity to prove his sanity claim, with the assistance of counsel.

To: Hon. Morris E. Lasker
Re: Mayo v. LaVallee

February 5, 1973
-----2

Accordingly, although petitioner is technically correct in stating that the 1960 trial court was bound to make some inquiry into petitioner's mental state when an indication of mental illness appeared in the pre-sentence report, this defect was remedied by the 1967 coram nobis hearing, and presents no basis for constitutional relief to be granted by Your Honor in the instant proceeding.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

Hillel Hoffman

HH:bm

HILLEL HOFFMAN
Assistant Attorney General

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Los Angeles, California 90071

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Exhibit H

Ind. No. 117d/60	Date filed: 4/21/60	COUNTY COURT, KINGS COUNTY PRELIMINARY INVESTIGATION		Investigated by: Edw. Levy	Case No. 60568
Presented: MAYO, VICTOR		Aliases:		Co-defendants: MAXIE CAMPBELL 460567	
Residence: 1430 41st Avenue		Age: 18	Birthdate: 6/15/42	Birthplace: KELLY, N. Y.	Draft class: Honorably
Wish: Mother and siblings		Marital Status: Single		At Offense: Earnings: Unemployed:	
Final plea or conviction: Robbery 3 - Assault 2 Petit Larceny		P. or V. Indicted for: Robbery 1 Petit Larceny Assault 2		Jail time prior to sentence: Since 4/2/60	
Name: Myron Barshay		Disposition: RECEPTION CENTER, CATARAUGUS, N.Y. Court recommended commitment - long parole.		Date of Conviction: 9/13/60	
Court Orders:		Date of Sentence: 11/14/60			

Numbers and Nature of Additional Charges or Warrants pending:

Multiple Felony Information			Defendants Counsel: Address: Michael Warshaw 16 Court St. Retained ☒ Assigned ☐ Asst. Dist. Attorney: 12345
Date of Adjudication	P. or T.	Adjudication	Arresting Officer: Precinct: Edw. McCarthy 83rd Sq. Shield # 791
L.S. 602-312	D.C.I. #	R.C.I. # 655078	Sec. Sec. #

Date:	Offense:	Court:	Disposition:
2/1/60	Viol. Adm. Code 475-5.2 (Possess knives.)	Adolescent's Court	Sent. Susp.

I. PRESENT OFFENSE

A. Abstract of indictment: The defendants acting in concert with each other, on or about 4/2/60, by means of force, unlawfully took from Eileen Browne, a quantity of cigarettes and U.S. currency valued at less than \$100.00 thus committing the crimes of Robbery 1st Degree, Petit Larceny and Assault 2nd Degree.

B. Description of the Crime: On 4/2/60 the two defendants, Victor Mayo and Mannie Campbell, spent about four hours together making a round of bars and grills, drinking beer and whisky. About 8:45 p.m. they went to 720 Knickerbocker Avenue, where Mayo entered the complainant's candy store while Campbell remained outside. Eileen Browne, the 60 year old complainant was seated behind the counter. Mayo went behind the counter and putting his hand in his pocket as if in possession of a revolver, said to her "This is a holdup." The complainant said to him laughingly "Well, there's the cash register".

The defendant turned towards the cash register and started to manipulate the keys in order to open it and he was having some difficulty for a few seconds. When the register opened, the complainant stood up, whereupon Mayo struck her in the face with his clenched hand, causing her to fall to the floor. At this point, Campbell, who was outside, stepped into the store and said "Let's go". Mayo delayed in order to take money from the register and some cigarettes. Campbell called to him excitedly "Let's go - you've got enough" and with that Campbell fled and Mayo followed into the street right afterwards. About a block away, Mayo caught up with Campbell and they continued their drinking in another bar.

While they were drinking Mayo implored Campbell to return to the general vicinity of where they had held up the complainant. Campbell thought it was an unwise thing to do but he finally agreed to do so. They arranged to make their observations on the way into a bar next door to the complainant's premises. They had no sooner entered the bar when three detectives who were waiting there, presumably on the assumption that criminals return to the scene of the crime, approached them and questioned them about what had happened. Mayo admitted the crime as alleged but stated that Campbell had nothing at all to do with it. Campbell stated that he thought Mayo went into the store for cigarettes but did not know he intended to hold up the complainant. The two defendants were identified by the complainant and they were held at the 83rd Precinct where they were booked for Robbery by Detective Edward McCarthy, shield 791.

C. Status of Accessories and Co-defendants: Both defendants, Victor Mayo, 1483 Gates Avenue, age 18, (age 17 at the time of commission of the crime) and Mannie Campbell, age 18, residing at 255 Greens Avenue, went to trial and were found guilty by a non-jury verdict on 9/13/60 of Robbery 3rd Degree, Assault 2nd Degree and Petit Larceny.

D. Defendants Statement to Probation Officer: Defendant Mayo says he spent the early part of the day, Saturday, his day off, drinking with a number of acquaintances. About 4 p.m. he went to the place of employment of Campbell and waited until the latter finished with work. Then the two made a round of bars and grills. They were on Knickerbocker Avenue when he decided to go into the complainant's candy store for cigarettes. Campbell was outside and believed him to be getting cigarettes. Mayo goes on to state that when he entered the store he saw no one inside and walked behind the counter and was surprised when he saw the complainant seated there, not having been able to see her from the customer's side of the counter. It was his intention to take some cigarettes and perhaps some money from the cash register if no one was in the store. However, when he saw the complainant, he was scared himself and thought it best to try to scare the complainant by simulating the possession of a revolver. It was there and then that he decided to go through the act as if he were committing a holdup. He insists he did not plan it.

BEST COPY AVAILABLE

Campbell, on the other hand, says that he did not enter the store until he wanted to find out what was delaying Mayo. He walked in at the very moment that he saw Mayo behind the counter striking the complainant. Seeing the complainant struck by Mayo filled Campbell with such consternation, Campbell declares that he turned around and hurriedly left the premises.

E. Attitude of the Complainant: The complainant, Elsie Brown, 720 Knickerbocker Avenue, feels that both defendants should be punished as provided by law.

F. Mitigating and Aggravating Circumstances: The defendant Mayo admits commission of the crime, and claims that the defendant Campbell had nothing to do with it. Campbell declares that he had nothing to do with the crime and that his first knowledge of Mayo having committed the crime came to him when he saw Mayo strike the complainant. The statements of both defendants are belied by information supplied by the complainant who states that at the time Campbell came into the store, he said to Mayo "Come, let's go - you've got enough". This would indicate Campbell was a look-out acting in concert with Mayo and knew exactly what Mayo's purpose was in entering the store.

Mayo seems to be a little more culpable than Campbell: In fact, Campbell was so fearful and apprehensive that although it would have been easy enough to make a getaway, he kept urging Mayo to hurry up and to leave. In addition Mayo seems to have gotten some kind of "kick" out of it and could not resist returning to the scene of the crime. Both are rather dull, or at least inexperienced in ways of the world and it did not occur to them that it would be easy enough to identify them together, inasmuch as Campbell is a negro and Mayo is a white.

The crime netted the defendants about \$17.00 and a few packages of cigarettes. Both defendants had been drinking together that day and after the crime they continued drinking. Although neither of the defendants has a serious prior criminal record, both have had some kind of legal conflict previously.

The complainant, a 60 year old woman, was punched in the cheek by the defendant Mayo. She required no medical treatment but says that for a few weeks pus oozed from her face until it healed.

The defendant Mayo has a history of mental illness, having been at one time confined at Rockland State Hospital. There were no manifestations of erratic behavior up to the time of his crime.

M. CAMPBELL No. 60567
V. MAYO No. 60568

11/3/60 EL

II. PREVIOUS LEGAL HISTORY

On 2/5/60 the defendant appeared in Brooklyn Adolescent's Court on a charge of violating Section 435-5.2 of the Administrative Code. On 1/30/60, it was alleged he had in his possession strapped around his waist on a belt two hunting knives, one with a six inch blade and one with a 4 1/2 inch blade. He pled guilty and Judge McGrover gave him a Suspended Sentence and warned him not to do this again. The defendant now explains that he had been beaten up by a group of unknown boys and he felt it might be some kind of protection if he carried a knife with him.

III. FAMILY BACKGROUND

A. Parents: The defendant's father was William Mayo, born about sixty years ago. He had an elementary education and was a laborer. In 4/52, while employed in a shipyard, he fell and was killed. He had been an automobile mechanic for some time prior to his shipyard job. He was previously married but there were no children of that union.

The defendant's mother, Rose Gorgona Mayo, was born about 46 years ago, had an elementary education, and has worked in factories. She is presently employed in a factory at \$1.30 per hour. She is about 14 or 15 years younger than the father was, her marriage to him being the second, the first having ended in divorce. There were no children by her first union. The mother now resides at 1480 Gates Avenue, Brooklyn.

B. Brothers and Sisters: Rosemarie is 23 and lives with her husband Martin George at 307 Humboldt Street.

William is 25 and single.

Barbara is 22 and lives with her husband Bernard Galigano at 1639 Balsey St..

Joseph is 20 and serves with the U.S. Army.

C.

Marital: The defendant is single.

IV. PERSONAL HISTORY

A. Birth and Early Development: The defendant was born in Brooklyn, N.Y. 6/15/42. Birth Certificate 21973-2 shows his name to be Victor Charles Mayo. He was the fifth and last child born to his parents, the father having died two months before the defendant was born. The mother says that he was a nine months baby and there was nothing unusual in the delivery or post natal period. In early childhood they began to note indications of "nervousness" the mother says.

The defendant was very young when the mother began to work in order to support the family. However, the defendant was admitted to St. Dominicks, Blauvelt, New York, on a neglect petition from Brooklyn Children's Court on 9/8/46. He had previously been under the care of Angel Guardian Home in Brooklyn and his going to St. Dominicks was so that he could join with his older siblings who were already committed there. There was history of such neglect as a child. For instance, he had been left at Kings County Hospital and remained there long after he was ready to leave, presumably because there was no one to take him home. He had also been in New York Foundling Hospital in May 1943 on a neglect petition and his going to Angel Guardians in April 1944 was also on a Neglect Petition. There was some manifestation of problem behavior at the institution and some efforts were made to help him and he received therapy through the psychiatric unit of the Catholic Charities Guidance Clinic. His behavior, nevertheless did not improve and he was transferred to the Actor Home on 6/15/53, a treatment Center at Rhinebeck, New York. The reason for this transfer was because of

his compulsive actions, stealing, lying, general destructiveness and inability to control his actions as well as his emotional flatness. On 4/22/53 it was recommended to Kings County Hospital. The mother would not consent to State Hospital commitment and removed the boy from the Astor Home on 5/5/53. A short time afterward on her own volition, the mother sought help at Kings County Hospital because of suspicion of mental illness.

B. School Period: The defendant, who was in institutions throughout his childhood, attended St. Dominic and the Astor Home. In the latter school, he entered while in the 5A. However, because of his dull mentality he was thereafter kept in ungraded classes. He was still in the ungraded class when he left the institution in the Spring of 1953.

C. Youth and Adult History:

1. Employment Record: When he came out of Kings Park State Hospital at the beginning of 1959, he worked for several months in the auto wrecking yard, Jimmy's Auto Wreckers, 66 West Avenue as a general laborer. It was not steady work and he merely filled in when the firm was busy. He left this in order to go to work for Aten Lower Company at 8417 Flatlands Avenue. Here he did air conditioning work, assisting by doing the menial aspects of the work of more experienced air conditioning people. He earned \$70.00 per week and was still employed at the time of his arrest. It is noteworthy that he obtained this job through his mother's brother-in-law who owns the firm.

2. Home and Neighborhood: For the past year the defendant has lived with his mother and siblings at 1800 Gates Avenue in the Ridgewood section of Brooklyn. They have a four room apartment for which the monthly rental is \$41.65. Two of the defendant's siblings are married and out of the home. One is away in the Army and thus there is only William left residing with the mother and the defendant. The main source of income is the mother who earns \$1.30 per hour as a factory hand.

The family had been pretty much intact until the father was killed in an industrial accident 4/27/42. There was neglect on the part of the mother thereafter and she resented the burden and criticism of in-laws so that she left the children. The Catholic Guardian Society made efforts to get the mother to reestablish her home but there was not much success at first. While the children were small the mother visited the children regularly. For a short time after they came home the Welfare Department assisted with Home Relief. The mother found it very difficult to make ends meet, and thus in October, 1952 she returned to work.

According to agency reports, the mother was always protective of the children and never allowed the case worker to get to know them. The mother's hostility made it difficult to work with the family. She saw problems in her children but could not accept help for them. She blocked any attempts to have her work out her feelings with regard to the children. She could even verbalize that the defendant needed help but she never really accepted the seriousness of his being mentally disturbed. Joseph and Rosemary were enuretic but the mother could only express her annoyance at the extra work it entailed. Attempts were made to have Barbara seen by a psychologist but these failed because the mother did not accept the plan. William wanted to enter Military Service but the mother stood in the way and tried to prevent it because she felt that he was needed to make contributions. At the present time, the mother shows some interest in the children, when the probation officer asked her what her plans are for them she stated that she only wanted to see the rest of the children grow up and be married. She, herself, has no plans for remarriage.

3. Character, Habits and Associates: The defendant is an 18 year old white youth, 5' 8" tall weighing 150 pounds. He is thick nascent and emaciated appearing. He makes

A rather dull impression but seems to understand the implications of his offense and could discuss it with some degree of intelligence, although appearing almost indifferent. His being below average in intelligence is corroborated by his having been in ungraded classes at school.

The defendant's emotional flatness has been a characteristic since childhood. Yet he verbalized that he regrets the offense and does not know why he did it. His mother describes him as an individual without friends who is alone most of the time unless with members of the family. She goes on to state that he has a girl friend and sees her occasionally. The defendant, on the other hand, denied having a girl friend and says that he rarely goes out socially. The co-defendant, Campbell, he claims is his closest friend, and met him when they were both employed at Jimmy's Auto Wrecking Service, last year. The defendant does not know how to dance and does not go to these places, except in the summer time when he visits Concy Island by himself.

As a hobby, the defendant developed an interest in making airplanes. He buys kits of balsa wood and follows the instructions. He has never given much thought to a future occupation but thought that he likes air conditioning, the field in which he is presently employed, and thought that eventually might become a technician. Apparently he is not sure that people who earn the higher salaries in this field are trained technicians with somewhat of a technical background. The defendant at the time of his arrest was underage for military service and therefore is not registered.

The defendant's behavior which eventuated in his commitment to Rockland State Hospital in August, 1953, has already been described above.

4. Religious: The defendant received religious instruction while at the St. Dominick's Home. He made his first communion and confirmation there. He claims that he was regularly attendant at Mass until his arrest and he still attends Mass services while awaiting sentence.

D. Mental and Physical Health History: There is no I.Q. rating available but the fact that he had been in ungraded classes at the Astor Home, would indicate that he was below normal intelligence. He was committed to Rockland State Hospital in August 1953 as a psychopathic personality with possible brain damage. Presumably, the suspicion of brain damage is based on an Astor Home psychiatrist report to the effect that the EEO was abnormal. When released from the Hospital 1/10/59 he was placed under the supervision of the after care division. The Social Worker, Miss Thalin, indicates that the defendant's progress was considered as good up until the time of his arrest. The After Care division was even considering his discharge.

There are no physical complaints and the defendant, as well as his mother believe him to be in good health.

V. SOURCES OF INFORMATION: This will be found in the Case folder.

Respectfully submitted

Edw. Levy
Investigating Probation Officer

Joseph A. Shelly
Chief Probation Officer

Joseph Shelly
1st Deputy, Chief Probation Officer

11/4/60 EL

STATE OF NEW YORK--DEPARTMENT OF MEDICAL HYGIENE

BROOKLYN AFTERCARE CLINIC

RE: MAYO, VICTOR

-1- - -

KINGS PARK

January 16, 1959: Patient, a sixteen year old boy, accompanied by his mother, was interviewed by this worker following Orientation today. Patient lives at 104 Covert St. (GL 3-0947) with two older siblings who work to support the family and his mother who is unemployed. There is a married sister living nearby, and the oldest boy is in the Army. Patient has spent his entire life in institutions. His father died two months before patient's birth and the mother, unable to care for the five children had them placed in a Catholic orphanage. The mother, vague about dates, said that about seven years ago the four oldest children came home but the patient's behavior was such (disobedience, running away) that he was sent to Rockland State Hospital; four months ago patient was transferred to Kings Park. Patient is not on medication. He said little, speaking only in response to a direct question by the worker. Mother says that plans are for the boy to begin work as a mechanic's helper in the business of a family friend as soon as he can obtain a social security card. The mother anticipates difficulties in this area as the boy is legally of school age. The patient says he would rather work than go to school. Since his release on convalescent care a week ago, the mother seems to have supervised him closely. She says that the neighborhood is a bad one and she is afraid her son will get involved with a gang. This worker gets the impression that patient is beginning to chafe against these restraints. Another social worker's appointment will be arranged as soon as the record is received, so that this worker can discuss plans for work or school and amount of supervision in view of hospital recommendations.

ysl/

Joan Lieberman,
(App.) Psych. Social Worker

→ 2/4 (over)

February 16, 1959: In response to worker's request, patient's mother called and spoke with worker. Patient has obtained his social security card but has been unable to find a job. Worker suggested that Mrs. Mayo and the patient come into the clinic to explore DVA possibilities. An appointment was arranged for the following day.

February 17, 1959: Patient failed social worker's appointment today and another letter was sent out scheduling an appointment for Wednesday, Feb. 25th.

fj/

Joan Lieberman
(app) Psych Social Worker

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MAYO, Victor

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KP

February 4, 1959: The patient, a 16 year old boy, attends the clinic with his mother for his first doctor's visit. He is very neatly dressed and relates in a polite but passive manner. He shows little emotional expression except at intervals when he appears interested, and then it is quite appropriate. There is a rather marked blinking that goes on fairly constantly. He has had this for a number of years. Victor says that he would like to find work but thus far has not been able to. He is interested in auto mechanics and said that he studied this some at Rockland. When he was questioned as to interest in a vocational school to continue this, he said that he was not. It appears that ~~while~~ he has anxiety about his meeting other boys rather than lack of interest in the subject. His mother appears to be moderately overprotective and does not let him go any place alone except occasionally to a movie. It apparently is a bad neighborhood; she said that a fourteen year old boy in the next building comes home drunk frequently, and there are innumerable gangs. During the day Victor remains active helping around the house, shopping or working crossword puzzles. The friend who promised the mother that she could help the boy get a job has not been able to follow through on this plan. Victor hopes to find some kind of part time employment, at least until he can get his working papers when he is 17. His adjustment appears stable at present. He is referred to the social worker to clarify the matter about working papers and also to discuss any recreational possibilities in his neighborhood. Return appointment is on March 9th.

mc/

R. Hainline, M.D.
Clinic Psychiatrist

February 24, 1959: Patient's mother called today to cancel social worker's appointment scheduled for tomorrow, since patient is to see the doctor on March 2nd. Mrs. Mayo requested that he see social worker at this time. She added that Victor has not been able to find work and is getting "restless" just sitting around. Apparently she accompanies him on all job interviews. Victor has no life of his own, no friends and no activities other than working around the house. Worker suggested to Mrs. Mayo that Victor be allowed to make contact with other youngsters. However, she is still fearful that he will get into bad company, and trouble. Day Center and DVR were mentioned as possibilities by worker and will be discussed with the patient during his interview.

mc/

(Miss) Joan Lieberman
(App) Psy. Soc. Worker

STATE OF NEW YORK--DEPARTMENT OF MENTAL HYGIENE

BROOKLYN AFTERCARE CLINIC

MAYO, VICTOR

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KP

February 27, 1959: After checking patient's card worker discovered that patient's doctor's appointment was not until March 9th, so Mrs. Mayo was called and arrangements were made for her and patient to come to see this worker on March 2nd.

mc/

(Miss) Joan Lieberman
(App) Psy. Soc. Worker

March 2, 1959: Patient and his mother were seen today. As usual, Mrs. Mayo conducted most of the conversation although Victor contributed when asked direct questions. The boy is very interested in mechanics, and showed some enthusiasm for taking a training course in this. He was also shown through the Day Center, and was asked if he would like to attend for a while during this transitional period. He was obviously hesitant, and worker explained that he could think about it and we could discuss it further after his appointment with the doctor on the 9th of March. Patient is having difficulty in finding work, is bored at home and lonely. Worker recognized this and stressed the role of the Day Center in giving him some meaningful activity as well as enabling him to evaluate his potential for DVR training.

mc/

(Miss) Joan Lieberman
(App) Psychiatric Soc. Wkr.

March 9, 1959: The patient's mother called in cancelling today's appointment but stating that Victor has been getting along quite well though he is still unemployed. Return appointment was made for April 3rd.

mc/

R. Hainline, M.D.
Clinic Psychiatrist

April 3, 1959: Patient attends the clinic today on an interim visit and is very neatly dressed. He has a transistor radio in his arm and said that he got it for Christmas. He is somewhat shy and shows little emotional expression but appears to be making a satisfactory adjustment in the home situation. He still has little social life except on Sunday when he plays ball with his brother and some other friends. His mother curtails his liberty a great deal and patient is not allowed to go out much alone unless he goes to a movie. He does not know of any community clubs and so is referred to the social worker to see if she can aid him in this respect. When asked about plans for the future, he continues to be interested in automotive mechanics or mentions that he might become a painter. He does not want to go to school to get any additional training and is waiting until June when he can get his working papers but would like to find June some odd job between now and then. Return appointment is on April 15th.

mc/

R. Hainline, M.D.
Clinic Psychiatrist

April 3, 1959: Patient was seen after his doctor's appointment today. Worker discussed with patient his lack of social contacts other than with members of his immediate family. Patient was hesitant, but finally began to speak of his desire to go out more and begin to act somewhat independently of his mother. Worker gave patient a written list of community centers in his area and in patient's presence called these centers to find out what the hours were and who was in charge of intake. Patient and worker also discussed patient's attempts to find parttime work. These attempts have been futile to date, perhaps because his mother accompanies him on job interviews. Patient was encouraged to come to the clinic alone for his next appointment. This was scheduled for April 8th to discuss his referral to NYSES.

fj/

(Miss) J. Lieberman
(app) Psych Social Worker

April 8, 1959: Patient was seen by appointment today. He came alone. Patient said that his mother easily agreed to let him come without her. Worker explained that she had spoken to his mother on the phone and that the mother is trying to relax some of her restraints. However, patient added that his mother had accompanied him to his most recent NYSES appointment. Patient seems to react in a rather passive way to his mother and generally falls in line with her ideas and plans. He remains shy and hesitant in appearance and exhibited little emotion or definite ideas of his own when worker questioned him as to his own feelings about work and plans for the future. Patient has some interest in auto mechanics, but this seems to be a rather vague and shadowy interest. He says simply that he is getting bored at home, is lonely and would like to find something to do. He says he will try some of his neighborhood community centers, although he recognized that he would be nervous among strangers. In talking with worker some of these fears seemed to be alleviated.

fj/

(Miss) J. Lieberman
(app) Psych Social Worker

May 4, 1959: Patient was seen by appointment today. He came from home with his mother who went shopping while Victor was at the clinic. Victor was asked if he had gone to any of the community centers as discussed in his last clinic visit. He said he had not and immediately switched the conversation to his last NYSES appointment on May 1st. The worker there, Mr. Cox did not refer him to a job but gave him an appointment for June. Patient still states that he is eager to work, yet registered little emotion when speaking of his failure to find work so far. Worker again pointed out to patient that his entry into some kind of vocational training program would be of long range benefit in seeking employment. Worker suggested that Victor discuss this at home before his next clinic appointment.

Patient seemed to be somewhat uncomfortable in the interview. He did not seem to have any real interest in the topics brought

STATE OF NEW YORK--DEPARTMENT OF MENTAL HYGIENE

BROOKLYN AFTERCARE CLINIC

MAYO, VICTOR

APSH

P.5

up by worker but did impress worker as having something on his mind which he was unable to discuss. Worker suggested another appointment in two weeks and patient agreed to this with no hesitation.

fj/

(Miss) J. Lieberman
(app) Psych Social Worker.

*6/15/59

PATIENT FAILED APPOINTMENT TODAY

May 28, 1959: Patient's mother called today. Patient is working and Mrs. Mayo states that he would be unable to keep clinic appointments for fear of losing his job. Worker instructed mother to have patient keep next scheduled appointment and to talk with the doctor then about arranging future appointments for the evening.

fj/

(Miss) J. Lieberman
(app) Psych Social Worker

*6/15/59 note above

Aug. 26, 1959

PATIENT FAILED APPOINTMENT TODAY

March 21, 1960: The above named patient and his mother were seen today regarding discharge planning. They were interviewed alone and together. The patient appears clean and nicely dressed. He shows little emotion during this interview, however, he is cooperative.

Patient has been living at a new address for several months now, 1480 Gates Avenue, Brooklyn, and would not have come to the clinic had his mother not visited in the old neighborhood and received the letter. No explanation was given as to why they did not inform us of the change in address. Patient continues to be employed in a tin company earning \$60.00 weekly. He will be 18 in June and would like to join the Armed Services provided the clinic doctor thinks it is all right.

In discussing the request this clinic received from Brooklyn Magistrates Ct. patient informed worker that he was taken into the court because he was carrying a pocket knife and this is unlawful. He stated that there is no other involvement and that there would be no sentence. He is to report to the court on 3/29/60. There does not appear to be any undue pressure or concern around this matter. Patient signed a release for information to be given to the court.

March 21, 1960: Cont'd.

Patient's mother stated that there are existing differences between her son and herself but that she considers these usual between a teenager and parent. She feels that the patient has made a satisfactory adjustment since his release from the hospital and is in agreement with discharge plans at this time.

The patient understands that he will receive a discharge appointment with the doctor as soon as there is a Thursday evening appointment available and that he can contact this clinic anytime before this.

sa/

(Miss) H. L. Tulin
(App.) Psych. Soc. Wkr.

March 22, 1960: Doctor Conference: Patient was referred to clinic doctor and seen briefly by him on March 21. Because of patient's lack of contact with this clinic in the past doctor would like to see him at a future date for further evaluation and possible discharge recommendation.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Soc. Wkr.

March 28, 1960: Contact with Court: Worker contacted Probation Officer by telephone today. He stated that in view of the circumstances, i.e. this was patient's first offense and there was no charge made by anyone, that patient would probably be placed into his mother's custody. Should patient be jailed they will contact us regarding the matter.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

June 17, 1960: Case was discussed briefly with clinic doctor. Since patient was not remanded to jail it was decided that he would be seen by the doctor on 6/23/60.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

June 23, 1960: Patient failed clinic appointment today.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

August 12, 1960: Patient's mother failed to contact this clinic as requested.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

STATE OF NEW YORK--DEPARTMENT OF MEDICAL HYGIENE

BROOKLYN AFTERCARE CLINIC

MAYO, VICTOR

-7-

KINGS PARK

September 8, 1960: In discussing this case at Supervisory Conference it was decided that before referral for administrative disposition was made, we should make another effort to contact the patient and his mother through certified mail. Letter was sent requesting Mrs. Mayo to call this clinic on 9/12/60.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

September 12, 1960: In response to a certified letter to Patient, patient's mother called this clinic today. Mrs. Mayo stated that patient is presently in the detention house and she did not think it necessary to respond to previous letters because she thought patient was discharged. It was learned that patient was charged with hitting and taking the purse of an old lady. Mrs. Mayo does not believe that her son did this, she has hired a "good lawyer" to defend patient. In discussing our interest in the case and the possibility of our being of assistance, Mrs. Mayo stated that she has given the lawyer approval to contact us if he so desires. At this time, she is not willing to come into the clinic for further discussion, stating that she is working and does not have the time. We encouraged Mrs. Mayo to keep in contact with us regarding the present situation.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

November 22, 1960: Since patient's mother has not been in contact with us regarding difficulties referred to on 9/12/60 we called N.Y. City Domestic Court directly and spoke to Mr. Scartto. It was learned that patient's case is pending decision by the judge and that patient is in jail. The Judge is aware that Victor had been on convalescent status but was under the impression that he had been discharged. Mr. Scartto said that he would bring this to the attention of the Court and that we would be notified of the outcome. It was also learned that Mrs. Mayo continues to work, that she recently moved (address was not available) and that she has not been cooperative in maintaining contact with the court.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

January 15, 1961: Worker called N.Y.C. Domestic Court today regarding patient. We learned that patient has been remanded to Elmira Reception Center pending further decision. Mr. Scartto stated that Elmira will probably request some information from our clinic. He was at that time unable to give us any other information regarding the case.

ysl/

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(Miss) H.L. Tulin
(App.) Psych. Social Worker

RE: MAYO, Victor

Hosp. #77531

(150)

February 6, 1961: RECOMMENDATION FOR DISCHARGE: Hospital requested return of patient's record as he is at Elmira. Because of this request and findings of 1/15/61 to the effect that patient is at Elmira Reception Center, case is being referred to Assistant Director for Administrative Disposition.

sl/ (Miss) H.L. Tulin
(App.) Psych. Social Worker

March 17, 1961: TRANSFER-OUT NOTE:
Information has been received that patient was recently admitted to the Elmira Reception Center. In view of this, record is being returned to Kings Park State Hospital for further disposition.

lb/ F. S. Willner, M.D.
Assistant Director

March 27, 1961: DISCHARGE NOTE:
The recommendation of the Aftercare Clinic physician, relative to discharge, is accepted and hereby approved. Patient was admitted to Elmira Reception Center, Elmira, NY

DIAGNOSIS: PRIMARY BEHAVIOR DISORDER IN CHILDREN
CONDITION: MUCH IMPROVED

D. C. Brown, M.D.
286 Clinical Director:es:ss M.D.

MAYO, VICTOR

-8-

KP

(96)

February 6, 1961: Hospital requested return of patient's record as he is at Elmira. Because of this request and findings of 1/15/61 to the effect that patient is at Elmira Reception Center, case is being referred to Assistant Director for Administrative Disposition.

ysl/

(Miss) H.L. Tulin
(App.) Psych. Social Worker

March 17, 1961:

TRANSFER-OUT NOTE:

Information has been received that patient was recently admitted to the Elmira Reception Center. In view of this, record is being returned to Kings Park State Hospital for further disposition.

clb/

F. S. Willner, M.D.
Assistant Director

Discharge Unimproved
3-27-61

STATE OF NEW YORK—DEPARTMENT OF MENTAL HYGIENE

(This form must be filed in the office of the County Clerk and a certified copy must be filed in the office of the Department of Mental Hygiene. A copy should also be retained by the institution.)

CERTIFICATE OF DIRECTOR, PHYSICIAN IN CHARGE, OR DULY DESIGNATED MEDICAL OFFICER

ROCKLAND STATE HOSPITAL

(Name of institution)

IN THE MATTER
OF
AN APPLICATION FOR THE CERTIFICATION
OF
Victor Mayo
AN ALLEGED MENTALLY ILL PERSON

Idn: 616267

Final Certification Made

County of Rockland ss.

1. That pursuant to an order of certification signed by the Hon. M. Henry Martuscello Justice, ~~Supreme Court~~ of the Supreme Court of the State of New York on the 21 day of August, 19 53 and filed in the office of the County Clerk of Kings County, Victor Mayo was admitted to the Rockland State Hospital for observation for a period not exceeding sixty days.

(Name of patient)

(Name of institution)

2. Dr. E. R. Clardy, being duly sworn, deposes and says that he is the ~~Attending Physician~~ physician in charge of Rockland State Hospital at Orangetown, N. Y. duly designated medical officer of

(Name of institution)

3. That he finds the said Victor Mayo to be mentally ill.

4. That he considers said Victor Mayo to be in need of continued care and treatment.

(Name of patient)

5. That the facts stated and information contained in this certificate are true to the best of his knowledge and belief.

E. R. CLARDY, M.D.
Supervising Psychiatrist

Subscribed and sworn to before me this 21 day of September, 19 53

Evelyn G. Mone
Evelyn G. Mone - Notary Public

(Official title)

EVELYN G. MONE
Notary Public, State of New York
Qualified in Rockland County

STATEMENT

I, Leonard J. Bolton, examined Victor Mayo and prepared the attached Psychiatric Report. While I have no independent recollection of Victor Mayo, based on the attached Report I can and do make the following statements and observations:

(1) The general impression I derived from my examination was that Mr. Mayo was definitely not aware or capable of fully appreciating the impact of his crimes.

(2) "Very flat" means "unexpressive", "lacking animation", and "displaying emptiness".

(3) In general, Mr. Mayo conveyed a feeling of "blah".

(4) "Adynamic" means that "there was a retardation of action and movement".

(5) Mr. Mayo appeared like a bump on a log.

(6) "Sphinx" means "statue-like".

(7) The basis for my observation that there was no evidence of brain damage is that a neurological examination must have been given, although I cannot recall if an "EEG" was performed.

(8) "Completely withdrawn" means that Mr. Mayo had detached himself from the world around him, that he paid scant attention to his surroundings, that he was abstracted, and that he was not looking at the doctor.

(9) Probably this withdrawn condition could have existed for several years. It definitely existed 4-5 months before my examination.

(10) Very possibly Mr. Mayo had an inability to communicate with his counsel.

(11) "Schizoid personality" means being detached from the world around you and being a loner. It is the kind of thing you would expect of a hermit or recluse.

(12) "[n]o evidence. . . of an active psychosis" means no delusions or hallucinations.

Dated: Elmira, New York
January , 1972

Leonard J. Bolton
Leonard J. Bolton, M.D.

State of New York

RECEPTION CENTER

Department of Correction

Elmira, N. Y.

D. C. I. No. 79.61.55.X
Number: 21677 Name MAYO, Victor Date 1/5/61

PSYCHIATRIC REPORT

Inmate is a very flat, adynamic, unmotivated type individual, definitely withdrawn and detached. There is a history of his having spent 5 years at Rockland State Hospital Childrens' Division. He states that was because he had been consistently getting into trouble. He was described there as having shown some emotional "emptiness" and this is the picture that we get of him at the present setting. Undoubtedly at times he can become explosive and burst forth into aggressive behavior, but characteristically he is as described above -- an adynamic sphinx.

There was some talk of brain damage, but there has been no evidence of it at any time, nor does examination at this time given evidence of central nervous system pathology. On the other hand he has been severely rejected. The father died before inmate's birth. The mother abandoned, apparently herself unstable, and inmate has lived his life without any close parental-child relationships. He has become completely withdrawn and presents all the earmarks at this time of the schizoid personality. There is no evidence, however, of an active psychosis.

DIAGNOSIS:

Schizoid personality.

PROGNOSIS:

Poor.

RECOMMENDATION:

Group psychotherapy is recommended. He undoubtedly has had a great deal of this in the past and more of it is still necessary at this time - Counseling. He will need stimulation.

Signed: *Leonard J. Bolton*

Leonard J. Bolton, M.D.
Assoc. Clin. Psychiatrist

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR MAYO,

petitioner,

-a

ROY BOMBARD, Superintendent,
Green Haven Correctional Facility,
Stormville, New York,

Respondent.

X

:

:

:

:

:

:

X

AFFIDAVIT IN OPPOSITION

76 Civ 1492 (JMC)

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

JOSEPH W. HENNEBERRY, being duly sworn deposes
and says:

1. I am an Assistant Attorney General in the office
of LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
attorney for respondent. This affidavit is submitted in
opposition to petitioner's application for a writ of habeas
corpus. The information contained in this affidavit is based
upon a review of the petition and upon the records of prior
judicial proceedings.

2. Petitioner and a co-defendant (Mannie Campbell)
were convicted by the former Kings County Court (Barshav, J.)
on September 13, 1960 of the crimes of robbery in the third
degree, and petit larceny, after a trial without a jury
pursuant to a waiver. Petitioner was sentenced to the Elmira
Reception Center. No appeal was taken from the judgment of
conviction until 1971.

3. Subsequently petitioner was convicted of manslaughter in the first degree upon his plea of guilty by the Supreme Court, New York County (Schweitzer, J.). In 1966 petitioner was sentenced as a second offender to a term of 15 to 25 years and is currently confined in Green Haven Correctional Facility, Stormville, New York.

4. In February, 1967 petitioner commenced a coram nobis proceeding in the Supreme Court, Kings County, attacking the 1960 conviction on the ground that he was incompetent at the time. A hearing was held before Justice Barshay on August 18, 1967, and subsequently, in a memorandum decision dated September 12, 1967, Justice Barshay disqualified himself under the mandate of People v. Hines and referred the matter to another Judge .

5. A new hearing was held before Justice Damiani on October 18, 1967. On December 4, 1967 Justice Damiani denied coram nobis relief in a memorandum opinion. This decision was affirmed without opinion by the Appellate Division, Second Department on June 30, 1969 (32 A.D. 2d 893). Leave to appeal was denied by the New York Court of Appeals on September 15, 1969.

6. Petitioner, in 1971, was resentenced on his 1960 conviction after a finding that he had not been advised of his right to appeal. Petitioner then appealed this conviction. The conviction was affirmed without opinion by the Appellate Division (41 App. Div. 2d 903, 342 N.Y.S. 2d 828) and leave to appeal to the Court of Appeals was denied.

7. On December 3, 1969, petitioner filed a habeas corpus in the Eastern District of New York. On May 26, 1970, the case was transferred to the Southern District of New York. On January 17, 1972, the District Court (Lasker, J.) conducted an evidentiary hearing, and on December 6, 1972 rendered a decision denying petitioner's application. The District Court held that the petitioner had not proven by a preponderance of the evidence that he was incompetent to stand trial within the meaning of Dusky v. United States, 362 U.S. 402 (1960), and that petitioner's silence about his mental condition in 1960 did not vitiate the contemporaneous evidence which indicated that petitioner had a "present ability" to consult with his attorney and to understand the proceedings in the state court.

8. Petitioner moved for reargument in the District Court. Petitioner advised the Court, in response to an inquiry by Judge Lasker, that under New York law the trial judge was bound to have made some inquiry into petitioner's mental state in 1960, as a result of retroactive application of Pate v. Robinson, 383 U.S. 375 (1966). The State conceded that such an inquiry was necessary under the New York Court of Appeals decisions in People v. Bangert, 22 N Y 2d 799, 239 N.E. 2d 644 (1968), and People v. Hudson, 19 N Y 2d 137, 227 N.E. 2d 193 (1967), cert. denied 398 U.S. 944 (1970), but contended that the proper remedy had been afforded to petitioner by the state courts in granting him a coram nobis hearing on competency in 1967. Petitioner rejoined that the hearing granted was not a full and fair hearing.

9. On August 23, 1973, the District Court denied petitioner's motion to vacate or amend the prior decision denying the writ. The District Court held that petitioner had not disproved the major premises of the prior decision, but

merely disagreed with them; and that petitioner had not demonstrated that the District Court's findings were unsupported by the record. With respect to the issue of state law that was raised by petitioner during reargument, the District Court held that a resolution of that issue was not necessary because petitioner had been afforded a full and fair hearing in federal court, thus "curing" the alleged defect in the state court proceedings.

10. On March 19, 1974 the Court of Appeals for the Second Circuit affirmed the decisions of the District Court without opinion.

11. Certiorari was denied by the United States Supreme Court.

12. Petitioner has now brought another application for a writ of habeas corpus. In this petition, he alleges that he was denied effective assistance counsel in that his counsel was inexperienced, provided the minimum amount of legal assistance, was aware prior to trial of petitioner's mental history and did not seek determination of sanity or competency, and was aware at the time of sentencing that petitioner had been committed to a state mental hospital in his past yet stated there was no cause why sentence should not be imposed.

13. Petitioner also alleges that he was denied due process in that at the time of his trial and at sentencing both the State and the court knew of his long history of mental illness, yet held no hearing concerning competency to stand trial in 1960 as required by Pate v. Robinson, 383 U.S. 375 (1966), and Drope v. Missouri, 420 U.S. 162 (1975).

15. For the reasons stated in the accompanying memorandum, the petition in all respects should be denied.

JOSEPH W. HENNEBERRY

Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
VICTOR MAYO, :

Petitioner, :

76 Civ. 1492 (JMC)

-against- :

REPLY AFFIDAVIT

ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility
at Stormville, New York, :

Respondent. :

----- X
REPLY AFFIDAVIT

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

JAMES B. KOBAX, JR., being duly sworn, deposes and
says:

1. I am a member of the bar of this Court and
represent petitioner Victor Mayo. I make this affidavit in
reply to the papers submitted by the State in opposition to
petitioner's petition for writ of habeas corpus. The facts
hereinafter stated are based on my own knowledge or on my review
of court records.

2. Petitioner contends that his right to a fair trial
was violated when the State failed to inquire into his competency
to stand trial sua sponte despite the substantial doubt of his
competency raised by information in the presentence report. The
State argues that the failure to hold a contemporaneous hearing
was cured by a State coram nobis hearing held in 1967.

3. Annexed hereto as Exhibits A and B respectively
are the decision denying the relief requested and the transcript

of the hearing itself. These materials make it clear that no psychiatric or medical evidence relating to petitioner's competency was introduced or considered in the coram nobis proceeding, primarily because the State was unable to provide such information. Relief was denied "[i]n the absence of pertinent medical or psychiatric proof." (Ex. A at 2.) No affirmative showing of competency was made.

4. For reasons made clear in petitioner's Reply Memorandum of Law submitted simultaneously herewith, the coram nobis hearing has not compensated for the inquiry into competency that the State should have made at the time of trial and sentencing under the Supreme Court's decisions in Pate v. Robinson, 383 U.S. 375 (1967) and Drope v. Missouri, 412 U.S. 420 (1975).

WHEREFORE, deponent respectfully requests that the writ be granted and that petitioner either be retried forthwith or that his first conviction be vacated and petitioner be resentenced for his second conviction.

5/

James B. Kobak, Jr.

Sworn to before me this

17th day of May, 1976

D/ Geraldine E. Griffin
Notary Public

Exhibit A

FORM NO. 1
SUPREME COURT

KINGS

COUNTY

MEMORANDUM

(CRIMINAL TERM, PART I)

By DANIANI, J.

Dated December 4, 1967

THE PEOPLE OF THE STATE OF NEW YORK

vs.

VICTOR MAYO

Indictment No. 1178/1960

This is an application in the nature of coram nobis to vacate a judgment of the former Kings County Court dated November 14, 1960, which convicted defendant of robbery in the third degree, assault in the second degree, and petit larceny after a non-jury trial and committed him to Elmira Reception Center (Barshay, J.). No appeal was taken from the judgment of conviction.

The petitioner stated in his petition "that he was so mentally incompetent at the time he allegedly committed the crime set forth in the indictment that he was completely unable to understand the nature of the act" and that "he was in such a mental state prior to the trial, during the trial and throughout the sentencing proceeding that he was incapable of assisting in his defense." On the consent of the district attorney, a hearing was held before Mr. Justice Barshay on August 12, 1967. At the conclusion of the hearing, Mr. Justice Barshay, in a memorandum decision dated September 12, 1967, disqualified himself because of the ruling in People v. Hines, 23 A D 2d 909, N Y L J July 12, 1967, p. 12, and referred the matter back to Criminal Term Part I.

A hearing has been held before this court wherein the defendant testified that from August 23, 1953 to September 3, 1958, he was confined to Rockland State Hospital and from September 4, 1958 to January 10, 1959 to Kings Park State Hospital. Thereafter, he was placed

on convalescent care at the Brooklyn After-care Clinic, where he reported until March 22, 1960, eight days before his arrest in the instant case. An inspection of the trial minutes by this court indicates that no question as to defendant's mental capacity was raised at the trial. Nor was any such issue raised at the time of sentence, even though the minutes thereof show that defendant's mother was present and that defense counsel was aware of defendant's hospitalization at Rockland State Hospital for five years.

No medical or psychiatric evidence of any kind was submitted in behalf of defendant at the hearing. Since the conclusion of this hearing, defendant's attorney has submitted the following letter received by him from Dr. Charles Buckman, Director of Kings Park State Hospital, dated May 19, 1967.

"Your letter of May 2nd, 1967, to Rockland State Hospital has been referred to us for reply. Dr. Brown, Clinical Director of this institution, conferred with you by phone today in this matter and it appears that since no observations have been made of this patient for the past several years, no judgment can be made concerning Mr. Mayo's ability to intelligently participate in court proceedings.

I trust that this information is satisfactory to meet your needs."

In the absence of pertinent medical or psychiatric proof, the defendant's application must be denied. The Clerk is directed to serve a copy of the order with notice of entry thereon and a copy of this decision on the defendant at the institution where he is presently incarcerated.

J. S. G.

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CRIMINAL TERM PART 1 ..

-----X
THE PEOPLE OF THE STATE OF NEW YORK, :

Plaintiffs, :

-against- :

CORAM NOBIS
HEARING

VICTOR MAYO, :

Defendant. :

-----X
(Ind. No. 1178/60)

Brooklyn, New York
October 18, 1967

Before:

Hon. VINCENT D. DAMIANI, Justice

Appearances:

JOHN MEGLIO, ESQ.,
Assistant District Attorney,
For the People

A. F. MARRA, ESQ.,
Legal Aid Society
BY: SIMON CHREIN, ESQ.,
For the Defendant

A. M. ZIMMER, C.S.R.
Official Court Reporter

304.

Q And you were arraigned on the indictment on April 29, '60, is that correct? A I don't know.

Q All right. You were arrested in April, '60, is that correct? A Yes.

Q Can you tell the Court where you were between August 25, '53 and September 3, '58? A Rockland State Hospital.

Q Were you an inmate of that institution? A Yes, I was.

Q And on September 3, '58, were you transferred to some other place? A Kings Park.

Q Kings Park State Hospital? A State Hospital, yes.

Q Can you tell me how long you were in Kings Park State Hospital? A About six months.

Q Now, if I were to tell you that you were released from Kings Park Hospital on January 10, '59, would I be stating the truth? A Yes, sir.

Q On January 10, '59, can you tell the Court what your status was as far as the hospital was concerned? Were you completely discharged or were you on convalescent care? A They put me on convalescent care.

Q Can you tell me where you were reporting for convalescent care? A 490 Fulton Street. The after-care clinic.

Q When was the last time that you were reporting to the Brooklyn After-care Clinic before you were arrested on this charge? A March 22nd.

Q '60? A '60.

Q In other words, about eight days before you were arrested, is that correct? A Yes.

Q Now, in connection with your conviction in this case, were you ever given a psychiatric examination? A No.

MR. CHREIN: I have nothing else to add.

THE COURT: Mr. Meglio.

CROSS EXAMINATION BY MR. MEGLIO:

Q Mr. Mayo, on the 21st day of September, 1967 you submitted a petition, a handwritten petition, for coram nobis relief, isn't that correct? A Yes, I did.

Q I show you this petition and ask you to examine the signature on it? (Handed to witness) On not only the first page, but on the last page of the affidavit. A That's my signature.

Q May I have it back? Now, in this petition, Mr. Mayo, you stated--I wish to refresh your recollection--"Subsequently the Petitioner, then a youth of 17 years old, with no previous record of court proceedings, was accorded a bench trial before the Honorable Hyman Barshay, an acting Justice of the County Court.

"The record indicates that the Petitioner orally waived his Constitutional rights to a jury trial. The record does not indicate that the Petitioner signed the waiver, as required by Article 1, Section 2 of the New York State Constitution

"The record further indicates that when the Petitioner waived his rights to a jury trial, he was obviously confused and could not have intelligently executed a waiver under those circumstances."

On the day of the trial, September 12, '60, you were represented by counsel, were you not? A Yes.

Q Who was your counsel at that time? A Mr. Warshaw

Q And he was with you in Court, wasn't he? A Yes, he was.

Q Do you remember September 12, '60, the day that you were in Court? Do you remember the day? A I don't know the date.

Q Well, do you remember when you were before Justice Barshey for your trial? A No. Not completely, no.

Q "Did the Judge ask you this question, 'How about you, Mr. Mayo?'" And I quote from the record--

THE COURT: What page is that of those minutes?

MR. MEGLIO: Page three of the trial minutes.

THE COURT: All right.

Q (Cont'd) "Defendant Mayo: No jury.

"The Court: Would you like to be tried by a Judge alone?

"The Defendant Mayo: Yes.

"The Court: Did you sign the waiver?

"Defendant Mayo: Yes.

"The Court: Did your lawyer see you sign it?

"Defendant Mayo: Yes."

MR. CHREIN: Your Honor, before the defendant answers that question, I would like--

THE COURT: He hasn't asked the question yet. What is the question?

BY MR. MEGLIO:

Q Now, in view of my recitation of the questions and answers--

THE COURT: Were you asked those questions and did you give those answers?

MR. CHREIN: At this point I would like to object on the grounds that the defendant's direct testimony does not encompass a claim of a non-waiver of a jury trial. His direct testimony dealt only with the psychiatric aspect.

THE COURT: What is the purpose of this proof, Mr. Meglio?

MR. MEGLIO: I am going to impeach the witness' credibility by indicating that in his petition he stated that he never signed any waiver. Yet, before Justice Barshay he told Justice Barshay he signed it, and I would like to ascertain which is correct.

THE COURT: All right, objection overruled.

Do you recall being asked those questions and giving those answers?

THE WITNESS: No, Your Honor.

THE COURT: All right.

BY MR. MEGLIO:

Q Upon reflection--I will go to my next question.

Mr. Mayo, what day were you sentenced? Do you recall?

A I don't. I think it was '60. I don't know.

Q Were you before Justice Barshay? A Yes.

Q I'm going to read you a portion of the minutes and I want you to pay attention and then I'm going to ask you if these questions were asked and whether you made these responses and I quote from the record on page 3 of the minutes of sentence.

"The Clerk: What is your name?

"The Defendant: Victor Mayo.

"The Clerk: If you have any legal or any other cause to show why judgment of the law should not be pronounced against you, say it now and address yourself to the Court.

A "Mr. Warshaw: No legal cause why sentence should not be imposed at this time. If I may say something in mitigation of sentence, at the time the defendant was apprehended and up to the present time, the defendant had admitted his involvement in this particular crime.

"He had admitted it and had cooperated with the authorities. He had intended to make a disposition before the Court and for reasons beyond his control, he was not able to do it.

"I have been in touch with the family and the mother is present in Court. The defendant hopes and does have an opportunity to have the same job that he had prior to being apprehended.

"I would like to bring your attention to the fact that he had from '52 to '57 been in Rockland State Hospital. He was placed there by his family. I have spoken to the defendant on many occasions. The defendant is aware of the severity of his crime and I ask Your Honor to take into consideration his background.

"He was a 17 year old boy and if we give him his opportunity to prove himself to his family and the Court that he can live as normally as possible and not become involved again. I ask Your Honor to give him this opportunity." B

Now, did the clerk ask you your name on this day?

A Yes, he did.

Q Did your lawyer, Mr. Warshaw, make the statement to the Court; the statement that I have just read? A I know he made a speech.

THE COURT: Talk up so we can hear you. Start again.

A(Cont'd) I know he made a speech, but I don't know exactly what he said.

THE COURT: All right.

BY MR. MEGLIO:

Q Did you on the day of sentence address Justice Barshay?

A No.

Q Did you tell Justice Barshay on the day of sentence that you were mentally incapable of understanding what was going on?

A No.

Q MR. MEGLIO: No further questions, Your Honor.

MR. CHREIN: One more question.

RE-DIRECT EXAMINATION BY MR. CHREIN:

Q Mr. Mayo, did anybody, any Judge, or any other official of the Court explain to you what a waiver of the jury trial involved, if you remember? A No, I don't.

MR. CHREIN: Thank you. Nothing else.

THE COURT: All right, step down.

(Witness excused)

MR. CHREIN: The defendant submits on the testimony heretofore given.

THE COURT: Have you any medical or psychiatric testimony?

MR. CHREIN: No.

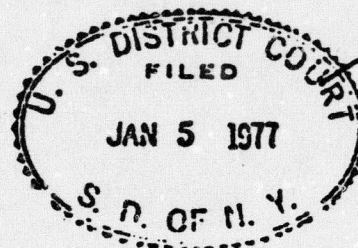
MR. MEGLIO: The People rests, Your Honor. However, I would like to respectfully direct the Court's attention to the fact that the absence of a particular type of testimony which would allegedly be favorable to the Petitioner's position, certainly is grounds upon which the Court can base an assumption that such testimony is not favorable, or less than favorable to the Petitioner.

I would just like to bring the Court's attention
to that basic assumption in law and rest.

THE COURT: All right. Decision reserved.

ooo0ooo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
VICTOR MAYO,

Petitioner,

-against-

ROY BOMBARD, Superintendent,
Green Haven Correctional Facility
at Stormville, New York,

Respondent.
-----X

MEMORANDUM

76 Civ. 1492
(JMC)

CANNELLA, D.J.:

Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is hereby denied.

Petitioner Victor Mayo seeks this writ, claiming that his 1960 state court conviction was in violation of his constitutional rights in that (1) the court failed to hold a competency hearing in the face of "bona fide doubts of competency" and (2) he was denied effective assistance of counsel.

FACTS

On May 25, 1966, when petitioner pleaded guilty to first degree manslaughter, he was sentenced as a multiple felony offender to a term of imprisonment of from 15 to 25 years. The predicate felony for this sentence was the

conviction now under review, whereby Mayo was found guilty of third degree robbery, petit larceny and second degree assault, all arising from the taking of less than twenty dollars from a candy store. Without the prior conviction, Mayo would have received a lesser sentence in 1966. Although Mayo is now on parole, he is still "in custody" within the meaning of the federal habeas corpus statute, see, e.g., Jones v. Cunningham, 371 U.S. 236 (1963), thereby giving this Court jurisdiction to decide the merits of the instant petition.

In 1972 Mayo sought federal review of the predicate conviction based upon his alleged incompetency to have stood trial and to have been sentenced in 1960. United States District Judge Morris E. Lasker denied Mayo's habeas petition, having found that Mayo did not meet his burden of proving his incompetency retroactively. United States ex rel. Mayo v. LaVallee, No. 70 Civ. 2202 (S.D.N.Y. Dec. 8, 1972). Although the issues raised by the instant petition were not the focus of Judge Lasker's inquiry,^{1/} the disposi-

^{1/} The prior petition before Judge Lasker did not operate to waive any claims not asserted therein, for it is well settled that "the usual principles of res judicata are inapplicable to successive habeas corpus proceedings." Smith v. Yeager, 393 U.S. 122, 124-25 (1968). A petitioner will be barred from asserting a new ground only if he "deliberately withheld [it]" in the prior proceeding, or "otherwise abused the writ." 28 U.S.C. § 2244(b)" Id. at 125.

tion of the prior petition necessarily touched on matters relevant herein, and this Court gives due consideration to those findings.

DISCUSSION

The State's Obligation to Hold a Competency Hearing

Petitioner claims he was denied a fair trial when the state court failed to hold a hearing sua sponte to determine his competency to stand trial. If the circumstances warranted such an inquiry the writ would have to be granted, for it would impose an impermissible burden on the petitioner to make his freedom hinge on a nunc pro tunc determination of his competency. Pate v. Robinson, 383 U.S. 375, 386-87 (1966).

The Supreme Court reckoned with the circumstances under which a court's failure to hold a competency hearing deprives a defendant of due process in Pate v. Robinson, supra, and Drope v. Missouri, 420 U.S. 162 (1975). In the latter case the Court reasoned:

The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of

course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 180.

The Court found the evidence indicating the need for a hearing to be weaker in Drope than in Pate, but noted that the petitioner's absence from a significant part of his trial prevented both the trial judge and defense counsel from "observ[ing] him in the context of the trial and [gauging] from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him." Id. at 181.

By contrast, petitioner Mayo was present throughout the entire proceeding. Although Judge Lasker stated his alarm "that a man of petitioner's mental and physical problems should go through an entire criminal trial without his difficulties even once being noticed," United States ex rel. Mayo v. LaVallee, No. 70 Civ. 2202 (S.D.N.Y. Dec. 8, 1972), at 11, he found that Mayo's "demeanor at trial and thereafter was such that the need for questioning his competency never arose," id. at 7-8. "He evidenced no signs of incompetence apparent to the Judge, Prosecutor or his own attorney." Id. at 7. The only information concerning

Mayo's mental history available to the court was contained in the presentence report prepared by the probation department. The report revealed a history of childhood neglect and mental illness, but noted that Mayo's progress was considered good by the social worker at the after-care clinic under whose supervision he had been placed. The probation officer concluded that Mayo "makes a rather dull impression but seems to understand the implications of his offense and could discuss it with some degree of intelligence, although appearing almost indifferent." The overall impression one is left with after reading the report is of an individual who had suffered acute mental illness during his childhood and adolescence but whose condition had improved substantially by the time of the events in question. According to Judge Lasker, "[p]etitioner's condition at the time of his 1960 trial [was] established to be one of limited intellectual capacity afflicted by a schizophrenia which appeared fairly stable during the year in question." United States ex rel. Mayo v. LaVallee, supra at 7.

In light of the above, this Court cannot conclude that, under the criteria established in Pate v. Robinson and Drope v. Missouri, the trial judge was under an obligation to hold a hearing to determine Mayo's competency in the absence of a request to do so.

Effective Assistance of Counsel

Petitioner further attacks the validity of his 1960 conviction and sentence claiming that his court-appointed attorney inadequately represented him. Specifically, Mayo argues that his attorney (1) did not inquire into his background either before trial or, especially, after a reading of the presentence report revealed to him petitioner's history of mental illness; and (2) did not make any effort to present a defense once the district attorney refused to accept Mayo's plea of guilty.

As already noted, petitioner's attorney was not made aware of petitioner's mental history until he read the presentence report, and the petitioner's demeanor was such that the possibility of incompetency was not readily apparent. At the time of sentencing the attorney advised the trial judge of Mayo's past institutionalization in an attempt to show mitigating circumstances. With respect to the attorney's handling of the trial, the Court finds it consistent with petitioner's original intention to plead guilty in the hope of getting a more lenient sentence.

These findings are supported by those of Judge Lasker: ○

Moreover, petitioner's attorney noticed no difficulty in his client's understanding. Petitioner did consult with counsel on several

issues including possible disposition of the charges by a guilty plea. It was not until sentencing that petitioner's lawyer learned of his client's record of institutionalizations and mental history. He stated for the record that petitioner had been committed by his family to Rockland State Hospital and testified that he learned this fact either from petitioner's Mother or the Court through the Probation Report (Tr. at 24-25). He stated also that having been admitted to practice only a few months at the time of the trial, he did not have the trial experience to make a routine check of petitioner's mental history in hopes of turning up some evidence which might be used in petitioner's defense. Despite his newness to practice, petitioner's lawyer did discuss the case with his father, an experienced attorney.

United States ex rel. Mayo v. LaVallee, supra at 9.

Accordingly, petitioner has not met his burden of proving that his representation was "so woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 914 (1969), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950), quoted in United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974).

Upon the Court's finding that Mayo's claims are

without merit, the petition for a writ of habeas corpus
is hereby denied.

SO ORDERED.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
January 6, 1977.

OFFICE OF THE ATTORNEY GENERAL
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MAR 25 1977

Louis J. Lepore
Attorney General